S. HRG. 106–644

GAO AND BIA REPORTS ON RISK MANAGEMENT AND TORT LIABILITY

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

ON

TO ENCOURAGE AND FACILITATE THE RESOLUTION OF CONFLICTS INVOLVING INDIAN TRIBES

JULY 12, 2000
WASHINGTON, DC

U.S. GOVERNMENT PRINTING OFFICE
65–757 CC WASHINGTON : 2000

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402

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WEDNESDAY, JULY 12, 2000

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 2:30 p.m. in room 485, Senate Russell Building, Hon. Ben Nighthorse Campbell (chairman of the committee) presiding.

Present: Senators Campbell and Inouye.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. The committee will be in order.

Today the committee will receive testimony on two reports that deal with the extent and degree of liability insurance tribal governments have in order to provide compensation for people injured as a result of accidents or torts committed by tribal employees. These reports were launched 2 years ago in the midst of the congressional debate over the doctrine of tribal sovereign immunity. In the last Congress, the committee convened hearings on legislation that would have waived tribal sovereign immunity from lawsuits to provide remedies to injured persons.

As an alternative to broad sovereign immunity waivers in tort matters, I introduced S. 2097 that would have required tribes to secure tort liability insurance to provide a remedy for injured parties. This legislation was amended to direct the Secretary of the Interior to conduct a comprehensive study of the degree, type and adequacy of liability insurance in place. Though this survey was due in June 1999, as of this morning, it had not been submitted.

Might I correct that, we just did receive that this morning.

In addition to the Interior Department survey, I asked the General Accounting Office to review the interaction of insurance coverage made available to tribal contractors as a result of the Federal Torts Claims Act and whatever private insurance the tribes have. The GAO report was submitted on July 5, 2000.

The findings of the GAO report are interesting, and provide this committee with an opportunity to act to make sure that there are no gaps in insurance coverage for tribal activities, and at the same time, make sure that there is an efficient use of both tribal and Federal funds in the purchase of insurance.

Senator Inouye is occupied in another committee, so we will go directly to the testimony. And if all of our witnesses, since there's only four, if all of them would come to the table. They will be Michael Anderson, Deputy Assistant Secretary for Indian Affairs, from the Bureau; Barry Hill, the Director of Energy Resources and Science Issues of the General Accounting Office, accompanied by Jeff Malcolm; Ethan Posner, Department of Justice; and Michael Willis, from Hobbs, Straus, Dean and Walker Law Offices of Washington.

And we'll start in that order, with Mr. Anderson starting. But I would tell you, Mike, I've known you a long time, and I want to tell you that I want you to take a message back that I am not at all happy with the performance of the Bureau. The issue of torts insurance and sovereign immunity have occupied this committee's time ever since I've been the chairman, and we talked about it even some time before that.

You know as well as I do that there are some people around here who would like to get rid of tribal sovereign immunity altogether. And that's no secret, that we've fought that back time and again. I can't do it by myself. And I have to tell you that I personally am in favor of having a way that tribes can compensate injured people without waiving that immunity. That's what this bill is all about.

But I am informed that we just did get your report. And I think that it's 13 months late, you had adequate time to do it. And I want you to tell that to the Assistant Secretary. In fact, I will myself, as soon as I can get on the phone and call him.

But the fact of the matter is, I think it's pretty apparent that the Bureau, it certainly violates the spirit of what this committee is trying to do, if not the letter of the law, when you ask them to turn in some kind of report and they drag their feet for over 1 year on the darned thing. You've had plenty of time to do it. They've got plenty of time to give gold star awards to people for meritorious service. Maybe we ought to start giving one of those gold stars to somebody who's going to complete the reports that the committee asks for.

We haven't even had time to look at the darned thing, so really frankly, I'm not quite sure what I should ask you. But I want you to take that message back, that I'm getting tired of it, and I'm sure Senator Inouye is, too.

Go ahead and proceed.

STATEMENT OF MICHAEL ANDERSON, DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY JIM JAMES, SPECIAL ASSISTANT TO THE DEPUTY COMMISSIONER OF INDIAN AFFAIRS

Mr. ANDERSON. Yes, Mr. Chairman; I'll take that message back. I do want to apologize on the record for the lateness of this report. Some of the issues I'll discuss in my testimony actually were the reasons for the delay. There's a lot of issues and discussions GAO has reported out. And as the Department of Justice [DOJ] will testify to, as to confusion of the scope of the Federal Tort Claims Act [FTCA] coverage. Those issues were being discussed in how we characterize them in our testimony as late as this morning.

That is, in part, the reason why the report's delayed. But that's no excuse and I will take that message back. I also accept your words and the need to cooperate with the committee in a meaningful way. So I'll take that back.

The CHAIRMAN. Thank you.

Mr. ANDERSON. Let me again, Mr. Chairman, thank you for the opportunity to provide testimony on the BIA's findings and recommendations, pursuant to the Indian Tort Claims Management and Risk Act. Basically, what that law asked us to do was to survey all federally recognized tribes, determine the degree, the type, the adequacy of liability coverage of Indian tribes and offer legislative recommendations that may be appropriate to include, and improve the provision of insurance coverage to Indian tribes; which would achieve the purpose of providing relief to those who are injured as a result of official actions of tribal governments.

To fulfill this mandate, we organized an ad hoc advisory team of tribal leaders, attorneys who represent Indian tribes, insurance industry representatives, consultants, and held a major conference in December 1998 to kick this off. Much of the work within the BIA was led by Jim James, an attorney from New Mexico, who's been familiar with these issues. He is also accompanying me today to answer more specific questions.

That was the effort that was begun. This survey instrument was sent out to all of the federally recognized tribes and Alaska Native governments in April 1999. We received direct responses from 144 tribes and information was provided to us from insurance carriers for an additional 65 tribes.

Of the 209 responses, 60 percent were from Indian tribes in the lower 48, and the remaining 38 responses were from Indian tribes and native villages within the State of Alaska. Although we didn't get 100 percent compliance in terms of our survey, we did get enough to form a bit of a picture, at least, as to what's going on in terms of coverage, duplicative services between private insurance companies and the FTCA coverage, which the GAO report has identified and which we have also identified in their report.

There is duplication of insurance. There is a cost to the tribes in many cases from a lack of clarity about how the FTCA applies. One of the problems we had in developing the report is, at the time this was negotiated, in the hearings that took place on sovereign immunity back in 1998, the BIA had asked for $1 million to do a survey that would actually be an adequate methodology that truly measured the issues that Congress asked us to do.

As has frequently happened with the BIA, we received no money to begin this survey. We did it within existing resources. I only mention that in defense of the BIA's work here, that we're frequently given tasks, monumental tasks, like surveying all tribes on all their insurance needs but without the tools to do it, and predictably, the results aren't always ideal. Yet with the cooperation of tribal governments, we were able to achieve some data and some information we hope will be helpful.

Let me just go to the major part of our testimony, which identifies four unique legal issues that both DOJ and the Department of the Interior [DOI] have provided commentary on. We wanted to offer a few comments on these issues, as well.

One of the issues that GAO identified that we agreed with is that the Federal Tort Claims Act does not provide statutory authority for the removal of FTCA cases filed in tribal courts. So a plaintiff sometimes will file a claim in tribal court. The tribal court doesn't have authority to remove it on their own. Time is wasted by having this claim heard in tribal court without authority to actually reach a judgment that the United States will then pay. That's because the Federal courts have exclusive jurisdiction to hear these cases arising from the FTCA.

We agree that the Act provides for removal of these types of cases filed in State courts, but there's no similar removal authority for cases filed in tribal courts. That is one of the recommendations we have, that the Federal removal statute, 28 U.S.C. section 1442, should be amended to permit removal of FTCA claims from tribal courts to Federal district courts. We would expect tribal support for that proposition, as well. At least the delay in having the wrong forum to hear these claims is resolved.

Another major issue raised by GAO is, court decisions have differed on whether the law of the place should be tribal law in tort claims, for those incidents occurring on Indian land, or State law, as the phrase has historically been interpreted. GAO stated the issue but hasn't taken a position on how it should be interpreted or recommended in any legislative remedy.

At this stage, what we think would be very helpful is a discussion with tribal governments and the Federal Government on this issue. The current view of the Department of Justice is that State law, not tribal law, should control in cases where the incident gives rise to an FTCA claim, when an FTCA claim occurs on Indian lands. We would be more comfortable at the Interior Department in having a full discussion with tribes in explaining the rationale for that position, and also having some discussion of the tribal views on that, as well. But I should reiterate, that's the current position of the Federal Government to date. That issue was identified by GAO.

They also identified an area where legal arguments have been made that the FTCA bars claims against tribal law enforcement officers for intentional torts, such as assault, battery, false imprisonment, and false arrest, because tribal officers are not considered investigative or law enforcement officers of the U.S. Government.

As DOJ's testimony points out, whether tribal police or other law enforcement personnel are acting outside the scope of their authority as law enforcement officers is a difficult question which can only be determined by an evaluation of the particular facts and circumstances involved. We concur with their assessment, and we're prepared to assist the Department of Justice in identifying the situations that give rise to their concerns, so that we, the BIA, and others, can train and educate our law enforcement personnel to reduce or eliminate liability for intentional torts.

Preventative risk management is really one of the major services I think the BIA can provide at this stage. So that law enforcement, where the majority of our claims come from whether it's false arrest, or injury while in incarceration, has proper training. This would ensure that proper and appropriate forces are used in situations where criminals are apprehended and transported.

Fourth, there are still legal questions regarding the FTCA coverage for tribal officials who exercise oversight over contracted programs, but don't participate in every facet of day to day program operations. This issue was identified in two cases in Nebraska and Washington State. Our colleagues at the Department of Justice, make determinations of whether to substitute a tribal judicial defendant on a case by case basis. While there's no policy, informal or formal, denying FTCA coverage to tribal council members who are senior administrative personnel, that's essentially the practice that's taking place.

Again, we would certainly be willing to assist our colleagues and the tribal community in trying to clarify and have more specific rules for the road on how that coverage will take place.

There are areas that need clarification as these instances point out, that might require that a tribe get more private insurance that may in fact be necessary. That's the kind of dialog that we think could take place to help assist and resolve those issues.

In conclusion, during the month of June, the Navajo Nation sponsored an event in Albuquerque, NM devoted to risk management practices, tort liability and other insurance related topics. We had over 400 tribal leaders and representatives across the country participate in that. We would certainly want to continue to work and assist in those kinds of efforts, so that education on simply how to file your FTCA claim, whether there should be clauses in insurance policies that specifically exempt FTCA coverage from the scope of the policies would be a good idea, that kind of technical assistance, so we reduce the cost both to the tribes and also to the Federal Government by having indirect cost policies that would pay duplicative insurance.

Finally, I just want to conclude by saying that there has been some discussion that this is an expansion of the Federal role when Congress in 1990 applied FTCA coverage to Public Law 93–638 contractors. That is definitely not the case, because these are tribal employees that are doing functions that the Federal Government would have been performing if it had not been contracted. And therefore, by acting in that role as Federal employees, or performing Federal functions on behalf of their tribe, there's no expansion at all of coverage of FTCA. It's simply a substitution of tribal employees.

I wanted to make that clear, that that is really a service, in many cases, that tribes are doing for the Federal Government. And that's why they so vitally need this FTCA coverage.

With that, Mr. Chairman, I note that as we stated at the outset, the report was just submitted and has not been studied by the committee. I would certainly make the offer to you or your staff to have me and the Assistant Secretary conduct a briefing for you or your staff at your convenience. Thank you, sir.

[Prepared statement of Mr. Anderson appears in appendix.]

The CHAIRMAN. Okay, we'll work a time that you can do that, because I'd appreciate that. And I've got a couple of questions, but why don't we go on to Mr. Hill, if you would continue.

STATEMENT OF BARRY T. HILL, DIRECTOR, ENERGY RESOURCES AND SCIENCE ISSUES, RESOURCES, COMMUNITY AND ECONOMIC DEVELOPMENT DIVISION, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY JEFF MALCOLM, SENIOR EVALUATOR, ENERGY, RESOURCES, COMMUNITY AND ECONOMIC DEVELOPMENT DIVISION

Mr. HILL. Thank you, Mr. Chairman. You correctly pointed out that accompanying me today is Jeff Malcolm. Mr. Malcolm, I'd like to point out, was responsible for leading our review of the Federal Torts Claim Act coverage for tribal contractors.

My comments this afternoon will focus on the FTCA claims history for tribal self-determination contracts and FTCA issues that are unique to tribal contractors. The report we issued last week goes into more detail about the three provisions that extended FTCA coverage to tribal contractors and the processing of FTCA claims by the Departments of Interior and of Health and Human Services.

And Mr. Chairman, if I may, I'd like to briefly summarize my remarks and submit my full statement for the record.

The CHAIRMAN. Without objection, your complete remarks will be included in the record.

Mr. HILL. We're here today because accidents happen. Interior and Health and Human Services identified 342 claims involving tribal contractors of BIA and IHS programs that were filed during fiscal years 1997 through 1999. As you can see from this chart to my left on the board, although about two-thirds of these claims involved BIA programs, they accounted for only about one-third of the total dollar amount claimed. Conversely, about one-third of the claims involved IHS programs, but they accounted for about two-thirds of the total dollar amount claimed.

The next board to the left there shows a breakdown of these claims. For BIA contracted programs, over three-fourths of the claims involved law enforcement, while for IHS contracted programs, about 45 percent of the claims involved patient care.

On this last board, the top graph emphasizes again the difference in the dollar amount claimed between claims involving BIA programs and those involving IHS programs. The median claim amount for the 228 claims involving BIA programs was $71,000. In contrast, the median claim amount for the 114 claims involving IHS programs was $1 million.

Finally, our analysis of the FTCA claims history showed that at both agencies, these claimed involved a small number of tribes. In total, the claims arose from 76 contractors, 60 of which were tribes and 16 of which were organizations. The bottom graph on this board shows the seven contractors that each were involved with 10 or more claims.

Our review also identified a number of issues unique to FTCA coverage for tribal contractors. At the administrative level, tribes may be using Federal funds to purchase private liability insurance that duplicates their FTCA coverage. While the Department of Justice looks for duplicative private liability insurance for claims that are litigated, neither Interior nor Health and Human Services routinely do so at the administrative level.

In our report, we recommended that Interior and Health and Human Services check for duplicative private liability insurance to prevent the Government from paying twice to resolve these claims, once for tribes' insurance premiums and once to settle tribes' FTCA claims. On the legal side as Mr. Anderson has already pointed out, there are several unique issues that have emerged from recent litigation. Since he spoke about them in some detail, I'll just briefly summarize those four issues for you, and we can handle any questions you have in the Q&A session.

The first issue dealt with FTCA not providing the necessary statutory authority for removing FTCA cases filed in tribal courts. The second legal issue involves questions that have been raised about whether tribal FTCA claims should be adjudicated on the basis of tribal law or State law. The third, legal arguments have been made recently that tribal law enforcement officers enforcing tribal laws should not be considered Federal law enforcement officers. And if this is the case, then claims for intentional torts against tribal law enforcement officers would be barred under FTCA.

And fourth, a recent decision by the Department of Justice not to provide FTCA coverage for tribal council members involved in litigation arising from the tribe's law enforcement contract has raised legal questions about FTCA coverage for indirect tribal employees. Mr. Chairman, that concludes my short statement. We'd be glad to respond to any questions you may have.

[Prepared statement of Mr. Hill appears in appendix.]

The CHAIRMAN. Thank you, Barry. Why don't we go ahead with Mr. Posner.

STATEMENT OF ETHAN M. POSNER, DEPUTY ASSOCIATE ATTORNEY GENERAL, OFFICE OF THE ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. POSNER. Good afternoon, Mr. Chairman. On behalf of the Department of Justice, I'm pleased to testify about claims under the FTCA in Indian Country.

Let me begin by restating the fundamental principle that guides the work of the Department of Justice with Indian tribes as to all issues. As you know, this Administration and Attorney General Reno are committed to working with Indian tribes on a government-to-government basis. And we are committed to protecting and encouraging tribal self-government.

The Department's own policy statement states that the Department shall be guided by principles of respect for Indian tribes and their sovereign authority and the United States' trust responsibility in the many ways in which the Department takes action on matters affecting Indian tribes. For this reason, Mr. Chairman, we believe that continued recognition of tribal sovereign immunity is an important part of the Federal Government's protection of tribal self-government. We have supported tribal sovereign immunity and we will continue to do so.

We have also promoted government-to-government dialog on the subject of today's hearing, tribal risk management. At the request of the chairman and the vice chairman, the Department of Justice cosponsored a conference on tribal risk management in December 1998. At that conference, we provided extensive guidance on our

policies, on our interpretation of the Federal Tort Claims Act and other legal matters affecting Indian Country. And there were many, many tribal representatives and members of tribal organizations at that conference.

As the committee knows, the FTCA provides an exclusive Federal remedy for property damage or personal injury claims arising from the negligent or wrongful act of any employee of the Government while acting within the scope of his employment. The Department of Justice defends suits brought under the FTCA, which may be filed in Federal court only after the claimant first proceeds with an administrative process involving the affected agency. If the matter remains unresolved and an action is filed in Federal court, we would substitute the United States as a defendant if we determined that the defendant employee was acting within the scope of his employment at the time of the incident.

The Department confronts FTCA claims in Indian Country in a variety of circumstances, and I think the GAO charts summarize that a little bit. One common example is a medical malpractice action filed against a doctor arising out of treatment provided at an IHS facility. Again, some of the GAO charts reflect that.

Another type of case is a use of force incident involving a BIA law enforcement officer in Indian Country. Again, I think the GAO charts illustrate that.

We also defend numerous cases arising out of Indian Self- Determination Act contracts. As the committee knows, the ISDA was amended to extend FTCA coverage to tort claims arising out of a tribal employee carrying out, that's the key phrase, carrying out an ISDA contract and acting within the scope of his employment. At the committee's request, we have focused our prepared testimony on the four legal issues described in the recent GAO report on the FTCA. Now, Mr. Anderson has summarized those four issues, so in my opening, I only want to say a brief word about two of those issues.

First, the removal issue, which Mr. Anderson and GAO have already touched on. Under the FTCA, the Federal District Courts have exclusive jurisdiction over any action covered by the FTCA. If someone happens to bring an FTCA claim in a State court, we can remove it, because the FTCA explicitly provides that those claims filed in State court may be removed to the appropriate Federal district court.

But as the committee knows, there's no parallel procedure that allows for actions covered by the FTCA that are filed in tribal courts to be removed to Federal court. We believe that the removal statute should be amended to permit FTCA actions and perhaps other actions involving tribal officials to be removed to Federal court. We are glad to see that Interior joins in this recommendation, and we are prepared to work with the committee to develop appropriate language to address these issues if the committee is interested.

Second, second legal issue, we understand that some tribes have expressed concern over what they perceive as a Justice Department policy regarding FTCA coverage of tribal council members. Mr. Anderson alluded to this, and the GAO witness alluded to this. The issue is whether, in a particular case, a tribal council member is

sued for carrying out a self-determination contract. The ISDA requires this analysis, whether the council member was carrying out the contract.

The question turns entirely on the particular facts involved, the actions of the relevant council members, the relevant contract language, the allegations in the complaint, those would all be factors that would have to be considered. In one set of cases, we concluded, based on the particular facts that were available in that particular case, that the FTCA did not cover the council members, because they were not acting to carry out the ISDA contract according to the allegations in the complaint.

But in another case, based on a different set of facts, we concluded that the tribal council officials were being sued for carrying out an ISDA contract, so we concluded that they were covered by the FTCA.

We have no policy on tribal council officials. Each case turns on the particular facts. One thing I'd like to remind the chairman of is that the law in this area, we do not believe, is uncertain. The standard is very clear, but the application of the facts may produce different outcomes, depending on the particular facts involved. So we have no overarching policy for coverage of tribal council members. It turns on the particular facts of each case.

Mr. Chairman, thank you for the opportunity to testify. And I would be happy to answer any questions on these or any other issues.

[Prepared statement of Mr. Posner appears in appendix.]

The CHAIRMAN. Okay, thank you. Mr. Willis, why don't you finish up?

STATEMENT OF MICHAEL WILLIS, ESQUIRE, HOBBS, STRAUS, DEAN AND WALKER LAW OFFICES

Mr. WILLIS. Thank you, Mr. Chairman.

My name is Michael Willis, I'm an attorney with Hobbs, Straus, Dean and Walker, here representing the Bristol Bay Area Health Corporation. Bristol Bay is a tribal consortium which operates the Indian Health Service Hospital in Kanakanak, Alaska. Bristol Bay provides health care services to 33 Alaska Native villages in the Bristol Bay region.

As a result of the legislative extension of the Federal Tort Claims Act, Bristol Bay has benefited from FTCA coverage for its IHS contracted health care programs for more than a decade. FTCA coverage for Self-Determination Act functions remains an important, positive policy decision. It has enabled Bristol Bay to avoid diverting program funds to pay the cost of medical malpractice and general liability insurance.

In Bristol Bay's case, since all health care activities are provided in accordance with its self-governance agreement with IHS, it no longer carries any medical malpractice insurance. As to general liability, Bristol Bay maintains private insurance for those activities not covered by the FTCA, and to provide coverage where the scope of FTCA protection is uncertain.

While the extension of the FTCA to tribal contractors has been an effective program in supporting the Federal policy of tribal self-determination, Bristol Bay brings to your attention a recent devel-

opment which raises serious questions about whether the Justice Department is fully supportive of these laws. The United States Attorney in Anchorage has demanded that Bristol Bay indemnify the United States for $2.8 million as recovery from the U.S. Attorney's settlement of a personal injury claim that arose from an incident that occurred during Bristol Bay's performance of its self-determination agreement with IHS. The IHS and the U.S. Attorney have agreed that the FTCA covered this incident, therefore the claim was filed, investigated, processed and settled in accordance with the FTCA.

After settling the claim, however, the U.S. Attorney, we understand with Justice Department approval, sued Bristol Bay's private insurer on the theory that the United States is an implied insured party to Bristol Bay's private insurance. The insurer has denied that the United States has any rights under this policy, because the policy was designed to supplement FTCA protection and does not duplicate that coverage.

In the meantime, the lawsuit is pending, and the U.S. Attorney has urged the Indian Health Service to file a contract claim against Bristol Bay for this $2.8 million under the Contract Disputes Act.

If the Justice Department continues to pursue this implied insurance theory here or elsewhere, then first of all, there would be no benefit to tribes based on the extension of FTCA coverage. In fact, there may be considerable more risk because of this policy, as tribes may find themselves liable for claims that the United States has defended on their behalf and settled or lost without consultation or involvement of the tribe or insurer in the litigation or in the terms of the settlement.

Second, it would defeat a primary purpose of Congress in extending FTCA coverage to tribes operating programs under the Self-Determination Act, that purpose of reducing the cost of insurance premiums. Congress took this step to protect tribes from having to redirect their program funds to pay for insurance costs and to avoid having to dip further into contract support funds. If the Government is an additional insured party under these private insurance parties, then there's certainly be no reason for an insurer to reduce premium rates based on that FTCA coverage.

So in order to preserve the intended FTCA protection for tribal organizations that are administering health programs under self-governance agreements with the Indian Health Service, Bristol Bay and other tribal cosigners of the Alaska Tribal Health Compact have proposed that the fiscal year 2001 annual funding agreement include a provision to specifically address this problem. The provision states that programs under the AFA are covered under the Federal Tort Claims Act, but that any insurance coverage obtained by the tribal organization does not insure the United States by implication or otherwise.

The Indian Health Service has indicated that it cannot agree to this proposed clause without Justice Department approval. So we're respectfully asking this Committee to Communicate to the Department of Justice and to IHS to agree to this proposed language and that this Justice Department policy be put to rest. This Communication is needed to assure that tribal contractors are able to rely on FTCA protection with full confidence that the United

States will not turn around and sue them or their insurers after the United States has defended an FTCA case ostensibly on their behalf.

Bristol Bay reaffirms that Congress' extension of FTCA provides an effective system of protecting tribal organizations who have assumed Federal program responsibilities, provided that those Federal agencies fulfill their responsibilities under the law.

Thank you, and I would be happy to answer any questions you may have.

[Prepared statement of Mr. Willis appears in appendix.]

The CHAIRMAN. Thank you.

Let me start with Mr. Anderson. You mentioned it would take $1 million, as I understood your comments, to do the survey. Why does it take $1 million to find out some information with tribes that can be done probably over the phone or by mail?

Mr. ANDERSON. Yes, Mr. Chairman; ideally you could do the survey over the phone. However, the tribal governments get so many surveys and consultation packages, that getting the attention of tribal personnel is virtually impossible. What we've done in similar circumstances, like the National Academy of Public Administration [NAPA] study is to have a team perform on-site visits. The BIA operations have a team that actually do site visits workload analyses and travel into Indian Country.

The CHAIRMAN. You're saying if you do it through the mail or the phone, they don't answer the phone or they don't answer the mail?

Mr. ANDERSON. We get about 25 percent.

The CHAIRMAN. And what percent did you get with this process? You still got like one-half, didn't you?

Mr. ANDERSON. We didn't mail it. We had meetings, we went out and had an active work group of various individuals. It can be done. What it involves really is having the tribes pay for a lot of this, their own attorney time and insurance.

The CHAIRMAN. What was the number you gave the committee on the number of tribes that you did get information on? Two hundred and something, was it?

Mr. ANDERSON. 209 tribes.

The CHAIRMAN. So less than one-half, even with that.

Mr. ANDERSON. Right. But that's also having the tribes bear a lot of the brunt of what the Federal Government really should be paying for.

The CHAIRMAN. Okay, well, you dealt a lot with the courts and training and a number of problems that were interesting to me. But the basis for the survey really for me was to find out who has the insurance, who doesn't, if there's models out there that we can use as, that are having some luck with self-insurance, things of that nature. You didn't expand on that at all. Would you comment on that?

Mr. ANDERSON. Sure. What we've found is that 90 percent of the Indian tribes, that operate BIA programs carry liability insurance.

The CHAIRMAN. That was 90 percent?

Mr. ANDERSON. Yes; 90 percent do. And that there were only 228 claims paid between 1997 and 1999 by the FTCA. Now, there were almost 19,000 claims filed by tribes, against tribes, during that same time frame.

The CHAIRMAN. Basically that's what these statistics are here?

Mr. ANDERSON. Right. So what the picture in the report is, there are almost 20,000 claims paid, or filed, and only 228 were paid by the FTCA. So it shows that tribes have insurance, claims are being filed and claims are being paid. But the FTCA is just a minuscule portion of paid claims. And that's being used.

The CHAIRMAN. In the survey you mentioned training and a number of other things. Did you find in that survey that some of those claims were related to poor training on behalf of the employee?

Mr. ANDERSON. Both. There's two reasons. One was that there wasn't certainty, at the tribal level, of what FTCA coverage was available to them as tribally contracted employees. So if they had a private insurance company, many times they would just go to them as a matter of course rather than to the FTCA. To help remedy that problem of lack of education we are now providing information with our Public Law 93–638 contracts and handbook that lay people can read, and not just lawyers, that explains how the FTCA works, how to file a claim and providing a list of contact people at the regional offices that will help assist the tribes in processing their claims. Because I think in the confusion of who to talk to and what the coverage is, many tribes just go to their insurance carrier and have them pay the claim, even for those who might be covered by the FTCA.

The CHAIRMAN. What percent of the claims were brought by enrolled members of the tribe, do you know?

Mr. ANDERSON. Let me see if I can get the breakdown of claims filed between tribal members and non-Indians.

We didn't distinguish between the claims filed between the tribal members and non-tribal members.

The CHAIRMAN. You said there were 20,000 claims, though, and 18,000 were paid by the tribal insurance, is that correct?

Mr. ANDERSON. No; almost 19,000 were filed. The claim paid figure was 13,000. And of those 13,000 paid by the tribes, the Federal Government paid 228 during that same time period.

The CHAIRMAN. Maybe I wasn't listening very carefully, but maybe Mr. Hill can tell me, looking at that chart and the smaller ones you turned in to the committee, it appears that an awful lot of the claims were made by a very few tribes, or claims against tribes. There's only a few tribes that get the majority of claims, is that correct?

Mr. HILL. That is correct.

The CHAIRMAN. With the Navajo being the highest one. How do you account for that? I mean,with as many tribes as we have in the United States, why are some tribes being sued more?

Mr. MALCOLM. Mr. Chairman, I'll respond to that question.

The CHAIRMAN. Identify yourself for the record.

Mr. MALCOLM. I'm Jeff Malcolm, I led the GAO's review and the report.

Really, it's a matter of education. As Mr. Anderson has already identified, there is an issue that the claimants that are injured, if it's a tribal member out on a reservation that is injured, may not know that they have this avenue available to them. Prior to this report, I wasn't aware what the Federal Tort Claims Act was my-

self. And one of the other issues also that has been identified is private insurers. So if a tribal member is injured and they approach their tribal government to say, I was involved in an accident, it's possible that they would be referred to the private insurer rather than the Federal Government for compensation.

The CHAIRMAN. I see.

Mr. ANDERSON. If I might add, Mr. Chairman, I think because tribes that take over law enforcement are going to have a higher percentage of claims, and the Navajo Nation has a large law enforcement presence, that's reflected in the claims that are filed against them.

The CHAIRMAN. Mr. Hill, let me ask you a couple of other things. Has the FTCA been extended outside the Federal Government to other entities besides tribes?

Mr. HILL. Yes; they have. They've been extended in cases of federally supported health centers, for contractors carrying out atomic weapons testing programs, as well as the Institute for American Indian and Alaska Native Cultural and Arts Development.

The CHAIRMAN. What was your reaction to discovering the Bureau and the IHS didn't track and monitor claims made against tribes under FTCA?

Mr. HILL. Well, I guess we were surprised. They're just not separating the tribal FTCA claims out from the other claims. And that was the challenge I guess that we faced, was going in there and sifting through the claims and determining which ones were tribal claims and which ones were not.

The CHAIRMAN. Mr. Posner, your testimony, going through it, if we read it right, you say that in any civil action against any tribal employee involving claims from the performance of self-determination contract functions, the Federal Tort Claims Act will apply. Where is there Congressional exception for employees who may be involved indirectly?

Mr. POSNER. Well, there is none. The test is whether they were carrying out the self-determination contract. In likely the vast majority of instances, in a claim like this, the tribal employees or council members may very well be acting to carry out the self-determination contract. And as long as they're acting within the scope of their employment, they would be covered by the FTCA.

There may be a particular case, and there was the litigation in Nebraska to which the GAO report refers, where we made the determination based on that set of facts, that the tribal council members were not covered. Now, one thing that we need to keep in mind I think is the tribal council members have other defenses to those claims. And in fact, it's my understanding that that very litigation in Nebraska was settled with virtually no additional litigation or expense to the tribal council members. But the Department did make the determination in that case that the tribal council members were not covered.

But in other cases, we've made the determination that they are covered.

The CHAIRMAN. The Department of Justice doesn't appear in tribal court cases. What is the rationale for the Department's refusal to appear in tribal courts when FTCA cases are filed there?

Mr. POSNER. I think there are concerns about waiving certain defenses if the United States appears. I think our general practice is to write a letter to the tribal court asking them to voluntarily dismiss or take some other action that's consistent with the FTCA. So we certainly don't ignore the tribal court proceeding, and we do have a dialogue with the tribal court. But we've made the determination that it's more prudent to proceed through a letter.

I think at times there are some U.S. Attorneys offices who may have appeared in tribal court. But as a general matter, we try to send a letter to preserve our options and to preserve various legal defenses.

The CHAIRMAN. Mr. Posner, if we clarified the removal statute, to provide authority for the Department of Justice to remove FTCA cases to Federal courts, I suppose you would have to appear in Federal courts, then, would you not?

Mr. POSNER. Right. We would, that's correct, Mr. Chairman. If the facts were appropriate, we would substitute the United States as a defendant, we would appear in Federal court and then it would be proceeding as a traditional FTCA claim. And that would be litigated by the Department.

The CHAIRMAN. Mr. Willis, your experience with the Department of Justice leads the committee to believe the official policy of the Administration is to look first to the tribe's own insurance policies, rather than extending coverage of the FTC. Is that an accurate observation?

Mr. WILLIS. That's the conclusion we reach. And I think we find it fundamentally one of the problems why tribal organizations aren't getting the kind of discounts based on Federal tort claims protection that they might. And I think insurers are wary, in addition to lack of information, lack of knowledge of the Act, I think there is some familiarity with the very large gray areas which could leave the insurer quite vulnerable.

The CHAIRMAN. And in that context, it's our understanding, inaction by the agencies led Congress in 1990 to extend permanently the FTCA to 638 contract employees, and now the Department of Justice is acting, at least to some degree, to erode that coverage by pursuing tribal insurance policies to pay claims. Do you agree with that?

Mr. WILLIS. That's our conclusion. Based on this case, and I think there are other examples as well, I think that the Nebraska case they're referring to was an example where the Justice Department did that.

The CHAIRMAN. What effect do you think those factors have on the quality of health care that your clients are trying to provide through compacts to their members?

Mr. WILLIS. Well, I think that health care provision is keyed on the amount of program funds that are directed to the tribes. And I think the key concern from our point of view, and as Congress has made arrangements, that program funds be designated for those health care programs and they not be siphoned off to meet expenses required for liability insurance or other kinds of coverage. So we feel the key provision is maintaining those funding levels and not being distracted and diverted by insurance costs.

The CHAIRMAN. Well, from your standpoint and from your experience, what are the views on the ways the IHS, the DOJ, DOL and so on have handled claims under the FTCA? Have they been adequate?

Mr. WILLIS. I think as overall, we would conclude that the handling of FTCA claims has been adequate to very good—It's an excellent provision. I think there are exceptional cases that have caused repercussions throughout Indian country of concern as to what extent FTCA would provide adequate coverage. And thus, I think, even with prudent management, in effect, we're getting a lot of duplicate insurance coverage and we're not getting those cuts so that the FTCA provides supplemental, or that private insurance provides supplemental coverage.

But the agencies have handled those claims fairly well, if at some degrees quite slowly.

The CHAIRMAN. Okay, thank you.

Well, I tell you, I have some further questions, but I think we're going to put those in writing, as Senator Inouye may also have some questions, too. And my background training is neither in insurance nor law. So some of them are going to be kind of technical, and I've got to go over with some staff attorneys to frame those questions up.

But we're going to submit a few questions probably to each one of you. And we'll keep the record open for 2 weeks, if we can get those to you right away, if you could answer those in writing, I'd certainly appreciate it.

With that, I appreciate your being here today to testify. Thank you. This committee is adjourned.

[Whereupon, at 3:18 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF ETHAN M. POSNER, DEPUTY ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Good afternoon. I am Ethan Posner, Deputy Associate Attorney General at the United States Department of Justice. The Office of the Associate Attorney General oversees the Department's civil litigating components, including the Antitrust, Civil, and Civil Rights Divisions, as well as numerous other Department components, including the office of Tribal Justice. My particular oversight responsibilities include matters arising from the Civil Division as well as a range-of civil enforcement and tribal justice issues.

On behalf of the Department, I am pleased to testify about claims under the Federal Tort Claims Act (FTCA) in Indian Country.

Let me begin by emphasizing the fundamental principles that guide the work of the Department of Justice with Indian tribes. Like the Congress, the Administration recognizes the importance of working with Indian tribes on a government-to-government basis. Federal government-to-government relations with tribal governments are rooted in the historical treaty relations and ongoing trust responsibility of the United States. President Clinton recently affirmed that:

Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. In treaties, our Nation has guaranteed the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. Executive Order 13084, Consultation and Coordination with Indian Tribal Governments, 63 Fed. Reg. 27655 (1998).

Similarly, Congress has declared that the Federal trust responsibility "includes the protection of the sovereignty of each tribal government." 25 U.S.C. section 3601.

Pursuant to these principles, the Department of Justice Policy on Indian Tribal Sovereignty and Government-to-Government Relations with Indian tribes acknowledges that "[t]he Department shall be guided by principles of respect for Indian tribes and their sovereign authority and the United States trust responsibility in the many ways in which the Department takes action on matters affecting Indian tribes." In that same policy statement, the Department declares its "commit[ment] to strengthening and assisting Indian tribal governments in their development and to promoting Indian tribal self-governance." The Department has taken steps to promote government-to-government relations with Indian tribes, including the creation of the office of Tribal Justice and the designation of Assistant United States Attorneys to serve as tribal liaisons in districts that contain substantial areas of Indian country.

The Department of Justice has also promoted government-to-government dialog in tribal risk management. At the request of Chairman Campbell and Vice Chairman Inouye, the Department of Justice, in conjunction with the Bureau of Indian Affairs and the Indian Health Service, sponsored a conference on tribal risk management in December 1998. The purpose of the conference was to share information on risk management, safety programs, loss prevention, and compensation mechanisms for

injuries that arise out of tribal activity. Tribal risk managers, representatives from the Public Risk and Insurance Management Association, State and local risk managers, and representatives from Federal agencies, including the Department, gave presentations at the conference.

Historically, the doctrine of sovereign immunity served as an absolute bar to recovery against the United States by those who experienced injury or loss as a result of tortious acts of employees of the United States. With the enactment in 1946 of the FTCA, the United States waived its sovereign immunity for "injury or loss of property, or personal injury or death arising from or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment[.]" 28 U.S.C. section 2679(b). The FTCA is the exclusive remedy for any civil action or proceeding for money damages "arising out of or relating to the same subject matter" as the above; thus, any "other civil action or proceeding for money damages" arising out of a set of facts covered by the FTCA is "precluded without regard to when the act or omission occurred." 28 U.S.C. section 2679(b)(1).

The Department of Justice defends suits brought under the FTCA, which may be filed in Federal court only after "the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. § 2675(a). If the Department determines that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose," the civil action "shall be deemed an-action against the United States . . . and the United States shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(1). Thus, for example, if a medical malpractice action is filed against a doctor in a Navy-operated hospital, and the Department determines that the doctor was "acting within the scope of his office or employment at the time of the incident," then the Department will substitute the United States as a defendant and the case will proceed as an FTCA claim against the United States in district court.

The Department confronts FTCA claims in Indian Country in a variety of circumstances. Perhaps the most common example is a medical malpractice action filed against a doctor or other medical professional arising out of treatment provided at a federally operated hospital or other medical facility located within Indian Country, such as an Indian Health Services facility. Similarly, the FTCA would be implicated if a Federal law enforcement officer (for example, FBI, DEA, BIA police), acting within the scope of his employment at the time of the incident, was named in a civil action involving the use of force arising from law enforcement activities in Indian Country. An accident involving a Federal Government driver on a road in Indian Country also would likely implicate the FTCA.

The Department also confronts FTCA claims filed against tribal members carrying out self-determination contracts under the Indian Self-Determination Act ("ISDA"). Enacted in 1975, ISDA furthers the goal of Indian self-determination by assuring maximum Indian participation in the management of Federal programs for Indians. See 25 U.S.C. § 450 and 450a (2000). The act provides that tribes may enter into self-determination contracts with the Secretary of the Interior and the Secretary of Health and Human Services to administer programs or services (such as education, medical services, construction) that otherwise would have been administered by the Federal Government.

In 1990, the ISDA was amended to provide that "any civil action or proceeding" against "any tribe, tribal organization, Indian contractor or tribal employee" involving claims resulting from the performance of self-determination contract functions "shall be deemed to be an action against the United States" and "be afforded the full protection and coverage of the Federal Tort Claims Act." 25 U.S.C. § 450f; see also 25 U.S.C. § 2804. Thus, if a claim resulting from the performance of functions under an ISDA self-determination contract is made against a tribal employee, and that employee was acting within the scope of his employment at the time of the incident, then the Department of Justice will defend the action and move to substitute the United States as a party for the tribal employee. These provisions are an important part of the ISDA and the Federal policies on which the act is based.

At the committee's request, we have focused our testimony on the four legal issues described in the recent GAO Report on the FTCA—removal to Federal court; "law of the place" (*State* v. *tribal law*); the extent to which tribal council members may be covered by the FTCA; and the extent to which tribal law enforcement officers should be considered Federal law enforcement officers for purposes of the FTCA.

Under the FTCA, the Federal "district courts" have "exclusive jurisdiction" over any action covered by the FTCA. 28 U.S.C. § 1346(b). Thus, if a claim under the FTCA (or tort claim covered by the FTCA) is brought against the United States or a FTCA-covered person in a State court or even another Federal court such as the

Court of Federal Claims, it is subject to dismissal or removal. See, for example, *Strick Corp.* v. *United States,* 625 F.2d 1001, 1010 (Ct. Cl. 1980) (Court of Claims has no jurisdiction to hear FTCA claims); see also *Louis* v. *United States,* 967 F. Supp. 456, 458–59 (D.N.M. 1997) (tribal court is not a "district court" under 28 U.S.C. § 1346(b)). The FTCA explicitly provides that FTCA claims filed in State court may be removed to "the district court of the United States for the district and division embracing the place in which the action or proceeding is pending." 28 U.S.C. § 2679(d)(2).

There is, however, no parallel procedure that allows for actions covered by the FTCA that are filed in tribal courts to be removed to Federal court. Over the past few years, Federal employees and tribal contract employees have been named in several FTCA suits filed in tribal court. Currently, the Department's options in dealing with these cases are limited—we can write the tribal court to request a voluntary dismissal of the case, or at least that part of the case involving Federal employees or defendants; or we can ask the appropriate Federal district court to enjoin or otherwise set aside the tribal court's actions. We cannot remove the tribal action to Federal court, however.

The lack of an available removal mechanism to transfer FTCA cases from tribal to Federal court should be remedied. Congress has made the determination that the Federal courts (not State or tribal courts) should be the exclusive arbiter of questions under the FTCA and it is an anomaly that the government can remove FTCA cases from State courts but not tribal courts. Fixing this gap in the removal statute is also consistent with the long tradition that the liabilities and obligations of the United States and its employees are determined by Federal courts, not State courts or tribal courts. As courts have recognized, State courts and tribal courts likely would not be as receptive to the sovereign immunity of the Federal Government as Federal courts. The lack of a removal provision to Federal court also can operate to the detriment of some plaintiffs who file a complaint (perhaps mistakenly) in tribal court. An errant filing of an FTCA claim in tribal court may cause the limitations to lapse on an otherwise timely claim before the claimant files in Federal court.

Likewise, litigants may expend scarce resources pursuing an action in tribal court that could and should be easily removable to Federal court.

For these reasons, the Department of Justice believes that a provision of the Federal removal statute, 28 U.S.C. § 1442, should be amended to permit removal of FTCA actions from tribal court to Federal district court. Other amendments to the removal statute regarding the removal of non-FTCA actions filed against tribal officers in State courts and non-FTCA actions filed against Federal officers in tribal courts also may be appropriate. If the committee is interested in these issues, we are prepared to work with appropriate staff to develop appropriate language to address these issues.

Under the FTCA, the United States may be liable for the negligent acts of Federal employees acting within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b); see also 28 U.S.C. § 2674. An issue has arisen in a few recent FTCA cases as to whether "the law of the place" is State law or tribal law when the alleged tortious act took place on tribal land. The Department believes that State law, not tribal law, provides "the law of the place"

First, when enacting the FTCA, Congress intended for the "law of the place" to mean the law of the State where the alleged negligence occurred, whether that act occurred on tribal land or not. As the accompanying House Report to the bill stated, "each case [under the FTCA] is determined in accordance with the law of the State where the death occurred." H.R. Rep. No. 748 (1947), reprinted in 1947 U.S.C.C.A.N. 1548. Recognizing this, the Supreme Court has observed that State law is "the source of substantive liability under the FTCA." *FDIC* v. *Meyer,* 510 U.S. 471, 478 (1994). Over the years, this has meant that State law applies even when the alleged negligent act or omission occurs on a Federal enclave or Federal land, a location that would require the application of Federal law if a private defendant was involved. See, for example, *Shankle* v. *United States,* 796 F.2d 742 (5th Cir.1986) (State law applies even though acts occurred on Federal military installation); *Lutz* v. *United States,* 685 F.2d 1178, 1184 (9th Cir. 1982) (same; acts occurred on air force base).

Second, if tribal law provided the law of the place, the United States and its employees would be subjected to the laws of more than 550 "places," the approximate number of federally recognized tribes. This expands the waiver of sovereign immunity far beyond what Congress intended in enacting the FTCA. As one court observed, if tribal law provided the law of the place [I]t would subject the United States to varying and often unpredictable degrees of liability, depending on the res-

ervation that was the site of the occurrence. In the District of New Mexico alone, for example, there are great differences between the many tribes and their approaches to legal issues. In some instances, the difficulty in proving the existence and substance of any tribal law on the subject of the tort would be considerable. The Court does not believe Congress intended such a result when adopting the FTCA....*Louis* v. *United States*, 54 F. Supp.2d 1207, 1210 n.5 (D.N.M. 1997) (citation omitted). Similarly, the administrative claims process mandated by the FTCA would be materially undermined and complicated because of the difficulties in ascertaining and applying tribal law.

Third, if tribal law provided the "law of the place," many cases under the FTCA would require application of both tribal law and State law. For example, if the FTCA complaint asserted claims against tribal and non-tribal personnel (as often happens), then a Federal court could be required to apply State law at least to the acts of the non-tribal personnel, resulting in the application of State and tribal law to the same underlying facts. A case in which both tribal and State law applies is inconsistent with the plain text of the FTCA, which requires application of a single "law of the place." Courts already have concluded that the law of one State, not two, must apply, even if multiple States have jurisdiction over the site of the alleged negligence. *Brock* v. *United States*, 601 F.2d 976, 979 (9th Cir. 1979). It would be incongruous if the law of two States cannot apply but the law of one State plus tribal law could apply.

Given these issues, it is not surprising that for more than 50 years the phrase "the law of the place" in 28 U.S.C. § 1346(b) has been understood to refer to State law. See *FDIC* v. *Meyer*, 510 U.S. 471, 478 (1994) ("[W]e have consistently held that § 1346(b)'s reference to the "law of the place" means law of the State). Indeed, prior to 1999, every single court to have, entertained an FTCA suit arising out of incidents occurring on tribal land applied the law of the State in which that land was situated. See for example *Champagne* v. *United States*, 40 F.3d 946 (8th Cir. 1994) (FTCA case alleging medical malpractice by the Indian Health Service leading to suicide, North Dakota law applied); *Sauceda* v. *United States*, 974 F.2d 1343 (9th Cir. 1992) (failure by BIA police to arrest drunk driver); *Red Lake Band of Chippewa Indians* v. *United States*, 936 F.2d 1320, 1325 (D.C. Cir. 1991). Although one court recently concluded to the contrary, *Cheromiah* v. *United States*, 55 F. Supp. 2d 1295 (D.N.M. 1999), we believe that case was wrongly decided, as a more recent court concluded. *Bryant* v. *United States*, Order, Civ. No. 98–1495 (D. Ariz. Jan. 11, 2000). To apply tribal law to FTCA actions would mark a dramatic departure from the great weight of authority spanning more than half a century of FTCA jurisprudence.

When the ISDA was amended in 1990, Congress extended "the full protection and coverage" of the FTCA to "any tribe, tribal organization, Indian contractor or tribal employee" who is sued. for actions performed "while acting within the scope of employment in carrying out" a contract under the ISDA. 25 U.S.C. § 450f and Notes. Under this provision, if the suit against the Indian contractor or tribal employee results from activities performed outside the scope of employment, then the individual would not be covered under the FTCA and the Justice Department would not seek to substitute the United States as a defendant. Likewise, if the individual was performing activities within the scope of employment but not in furtherance of the "carrying out" of an ISDA contract, then the FTCA also would not apply. The question in civil actions arising out of the performance of ISDA contracts, therefore, is whether the Indian contractor or tribal employee is being sued for "carrying out" the performance of the self-determination contract.

The Department of Justice makes that determination on a case-by-case basis. Pursuant to applicable statutes and regulations, we review the facts in each case and make a decision based on the provisions of the relevant statutes, the actions of the tribal personnel, and the particular terms of each contract. We understand that some tribes have expressed concerns based on a decision we made regarding tribal council.members in two related cases filed in Nebraska. In that litigation, the plaintiff sued the tribal council and various tribal employees, alleging injuries arising out of the Omaha Tribe's management of a detention facility pursuant to a self-determination contract. The information provided indicated that the council members, only connection to the ISDA contract was that they initially approved the master self-determination contract, which included the law enforcement contract at issue in the case. Based on that information, the Department concluded that the tribal council members were not involved in "carrying out" the contract and, therefore, were not covered under the FTCA in that particular litigation.

The Department of Justice has no policy, formal or informal, of denying FTCA coverage to tribal council members or senior administrative personnel. On the contrary, we have extended the protections of the FTCA to tribal council members in

at least one other case, again based on the particular facts and circumstances involved. we will continue to work closely with tribal personnel to ensure that the protections of the FTCA apply in all appropriate circumstances.

As the recent GAO report on the FTCA explains, the FTCA bars claims for many intentional torts (such as assault, battery, and false arrest) except for those that may be committed by "investigative or law enforcement officers of the United States." 28 U.S.C. §2680(h). The FTCA defines "investigative or law enforcement officers of the United States" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. §2680(h). If, for example, the case at issue involved the use of force on an Indian reservation by an FBI agent, or a DEA agent, or a BIA police officer, then the officer in question would almost certainly be an "investigative or law enforcement officer of the United States." And if that officer was otherwise covered by the FTCA (that is, he was acting within the scope of his employment), then the United States would be substituted as a defendant as to the common law tort claims and the action for excessive force could proceed under the FTCA.

There is also the question of whether and to what extent tribal police or other law enforcement personnel are acting as "investigative or law enforcement officer[s] of the United States." If a tribal police officer had a BIA commission, or was performing services pursuant to a law enforcement agreement between the tribe and the Department of the Interior authorizing the officer to enforce a "law of the United States," see 25 U.S.C. 2804(a), then the officer almost certainly would be considered an "investigative or law enforcement officer of the United States." Conversely, there could be other situations in which a tribal law enforcement officer should not be considered an "investigative or law enforcement officer of the United States." It would depend on the particular facts and circumstances involved.

Mr. Chairman, we appreciate the opportunity to discuss these important legal issues and I would be happy to answer any questions you or the other members may have.

TESTIMONY
OF
MICHAEL J. ANDERSON
DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS
ON THE
BIA AND GAO REPORTS
ON
RISK MANAGEMENT/TORT LIABILITY
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

July 12, 2000

Mr. Chairman and Members of the Committee, thank you for the opportunity to provide testimony on the Bureau of Indian Affairs (BIA) findings and recommendations pursuant to the Indian Tort Claims and Risk Management Act of 1998. Our task was to survey all federally recognized tribes to determine the degree, type and adequacy of liability coverage of Indian tribes and to offer legislative recommendations that may be appropriate to improve the provision of insurance coverage to Indian tribes and which would achieve the purpose of providing relief to persons who are injured as a result of an official action of a tribal government.

To fulfill this mandate, we organized an ad hoc advisory team of tribal leaders, attorneys who represent Indian tribes, insurance industry representatives, consultants who specialize in Indian policy matters, and federal employees who assisted in the development of a survey instrument.

The survey instrument was sent out to all federally recognized Indian tribes and Alaska native villages in April 1999. We received direct responses from 144 tribes and information was provided to us from insurance carriers for an additional 65 tribes. Of the 209 responses, some 60 percent were from Indian tribes from the lower 48 states and the remaining 38 responses, were from Indian tribes and native villages within the State of Alaska.

HISTORY

In order to understand the status of tort law within Indian Country, it is important to briefly review the historical development of American jurisprudence. Included in the jurisprudence common law tradition, "received" by the New World colonies in 1763, was the principle or doctrine of sovereign immunity. That doctrine, originating primarily from within the ruling monarchies of western Europe, is simply stated: A subject within the kingdom could not sue the sovereign because, presumptively, the king could do no wrong. When the American colonies coalesced into a secular confederation of states and eventually into a republic, the notion of sovereign immunity was adopted by the national government of the newly formed states and commonwealths. Under this proposition, the federal government was not liable for personal injuries or property damage suffered by private

citizens and caused by the negligence or wrongful acts of its employees. The status of federal governmental liability remained in this posture well into the mid-twentieth century until the passage of the Federal Tort Claims Act (FTCA) in 1946.

THE FEDERAL TORT CLAIMS ACT

With the passage of the FTCA, Congress provided redress to private citizens for harm caused by the federal government through the actions or omissions of its employees. See 28 U.S.Code Annotated, §§ 1291, 1346 (b), (c), 1402 (b), 1504, 2110, 2401 (b), 2402, 2411 (b), 2412 (c), 2671-2680 (1994).

From its original form, the FTCA has undergone numerous amendments to identify the specific torts that fall within the scope of its coverage. The FTCA has evolved into a remedy against the federal government for the acts or omissions of its employees and agents. The FTCA sets forth certain conditions that must be met before a claim may be considered. These can be seen in the following limitations set forth in the FTCA: (1) The FTCA prohibits any claim for punitive damages; (2) It establishes strict time requirements for when claims must be filed; (3) It provides specific direction on the administrative procedures all claims must follow, otherwise they will not be considered; and (4) The FTCA does not allow for jury trials. The FTCA establishes the federal district court as the forum with exclusive jurisdiction to hear FTCA claims once administrative remedies have been exhausted.

Today, 25 years after the enactment of Public Law 93-638, approximately two-thirds of the BIA appropriated program funds are administered by the Indian tribes, themselves, either under contracts or through compacts under provisions of the Indian Self-Governance Act of 1990.

INDIAN SELF-DETERMINATION AND EDUCATIONAL ASSISTANCE ACT OF 1975

When Public Law 93-638, as amended, was passed by Congress, coverage under the FTCA was *not* initially extended to tribal governments or tribal organizations that contracted to perform federal functions or provided services in accordance with provisions of the Self-Determination Act. As originally envisioned, the costs of liability insurance for these contracted programs were to be borne by the tribes or tribal organizations, themselves. In turn, tribes included private insurance costs in either their direct or indirect program costs. Section 102(c)[1] of Public Law 93-638 authorized the Secretary to require that Indian tribal contractors obtain adequate liability insurance coverage policies which would contain waivers of the right of the insurance carrier to assert sovereign immunity as a defense in any lawsuit filed by an individual injured by the actions of a tribal

[1] 25 U. S. Code Annotated Section 450f(c), Public Law 93-638, Title I, Section 102, January 4, 1975, 88 Stat. 2206.

employee operating within the scope of the contracted program.[2] Because of the concerns cited above, Congress decided to take some steps to remedy these problems.

Under provisions of Public Law101-121, Congress temporarily expanded the definition of "federal" employees to include Indian tribes and tribal contractors. This action allowed contracted programs to fall under the umbrella of FTCA coverage. Thereafter, in 1991, pursuant to the Interior and Related Agencies Appropriation Act, Public Law 101-512, Congress permanently extended FTCA liability coverage to Indian Tribes and tribal organizations funded under provisions of Public Law 93-638. The relevant language included the following:

> *With respect to claims resulting from the performance of functions during fiscal year 1991 and thereafter, or claims asserted after September 20, 1990, but resulting from the performance of functions prior to fiscal year 1991, under a contract, grant agreement, or cooperative agreement authorized by the Indian Self-Determination and Education Assistance Act of 1975, as amended ... an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs ...while carrying out any such contract or agreement and its employees are deemed employees of the Bureau ... while acting within the scope of their employment in carrying out the contract or agreement; provided that after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the FTCA.*

Prior to Public Law 93-638, BIA and IHS operated programs on the reservation for the benefit of eligible Indians. Work was performed through career employees on behalf of the Federal Government. Therefore, the immunity provided by the FTCA did not require much adjustment as all work typically fell within the scope of employment. With the passage of Public Law 93-638, it became necessary to extend FTCA coverage to tribal contractors who had entered into contracts to

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[2] Note that Section 110(1) of the Self Determination statute recognizes and leaves unmodified the sovereign immunity of Indian tribes: "Nothing in this Act shall be construed as. . . affecting, modifying, diminishing, or otherwise impairing the sovereign immunity enjoyed by an Indian tribe." See, 25 U. S. Code Annotated, Section 450n, "Sovereign immunity and trusteeship rights unaffected.". A recent case on the subject of Indian tribal sovereign immunity is Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 118 S.Ct. 1700, 1702 (1998) in which the U. S. Supreme Court upheld the sovereign immunity defense by a tribe in a civil suit involving breach of contract. The Court held that the immunity extended to contracts whether made on or off the reservation and that as a matter of federal law "an Indian tribe is subject suit only where Congress has authorized the suit or the tribes has waived its immunity." As to the situation in Alaska, there is presently a case, Cigna Insurance Co. and Native Village of Mekoryuk, et al. v. Moses, on appeal before the Alaska Supreme Court on the issue whether native villages established pursuant to provisions of the 1971 Alaska Native Claims Settlement Act can raise the sovereign immunity defense when they are sued.

operate programs previously performed by Federal Government employees. Prior to the amendment, the practice of the tribes was to provide liability insurance among administrative costs charged to contracted programs. Thus, the FTCA coverage is not an expansion of the Federal Government liability because the contracted programs were merely substituted for the Federal employees who performed those functions under those contracted programs. Essentially the exposure of the Federal Government for FTCA claims is the same as it was prior to the passage of Public Law 93-638. Since coverage was extended to tribes, they have continued to maintain private liability insurance.

We have found that in comparison to some of the state Tort Claims Acts that tribes maintain higher levels of liability insurance coverage than those allowed under statutory schemes by the states. According to the Public Risk Management Association's Tort Liability Today, A Guide for State and Local Governments, 3rd edition of 1998, in the states of Arizona, California, Washington, Michigan and Connecticut there is no statutory limit on the amount of damages that could be awarded to an injured party for a tort claim against the state. However, in the remaining states where tribes exist, the state occurrence limits for tort claims range from a low of $50,000 in Nevada to a high of $5,000,000 in Nebraska. Altogether, these 23 states average around $900,000 in limits placed on tort claims against the states, excluding the five that do not have statutory limits. At the same time, although not all tribes in these states responded, those that did respond, reported general liability insurance coverage of either one or two million dollars. The comparison data shows that the majority of those tribes provide a higher occurrence limit under tribal insurance policies than the states allow under state occurrence limits. We also noted that only 5 of the 92 tribes in this comparison have occurrence limits under $1 million, while the states' occurrence limits are set at $500,000 or less for 30 states in the lower 48.

BIA/GAO Report Findings and Recommendations

We asked tribes to tell us the number and type of claims that were filed against them for personal injury or property damage which may have occurred as a result of official government activity. The total number of claims we found were 19,286 for all 146 tribes that responded to our question. Of those claims, almost 93 percent of the claims arose in tribes which had gaming operations. The chart located at page 6 of the report shows the breakdown between gaming and non-gaming claims. However, it is worth mentioning that the greatest number of claims were filed by tribal employees and our survey did not distinguish between Indian and non-Indian claimants.

We would also like to direct your attention to the question concerning the manner in which claims were handled, i.e. paid, not paid, referred, FTCA coverage or the defense of sovereign immunity raised, the number of times that sovereign immunity was raised as a defense was very minimal. One of the insurers on the advisory group reported that, between 1996 and 1999, his company reviewed and disposed of over 9,000 claims made against their clients, which consisted of tribes, tribal organizations or tribal enterprises. Of these claims 4,641 were either general liability or automobile claims and not once was the defense of sovereign immunity raised. It was further reported that only 40 of the more than 9,000 claims ever went to litigation.

Another important item brought to our attention during the course of this study by some tribes was the issue of FTCA coverage extending not only to those contractors charged with carrying out the terms of the contract, but those tribal officials that may be named as defendants in a tort action because they were signatories on the contract. This occured in two cases we are aware of, where the facts and allegations were completely different. We mention this issue because it was raised by the tribes and because it may cause some confusion over when FTCA coverage is applicable and when the tribe's own liability coverage applies.

The GAO report identified four unique legal issues and both DOJ and GAO have provided commentary on these issues. We would like to provide our comments on these four issues, as well.

1. FTCA does not provide statutory authority for the removal of FTCA cases filed in tribal courts. The Federal district courts have exclusive jurisdiction to hear cases arising from FTCA claims. The Act also provides for the removal of these types of cases filed in state courts but provides no similar removal authority for cases filed in tribal courts. The Department of Justice has suggested that the lack of available tribal removal mechanism for FTCA cases should be remedied. We concur with the Department of Justice's recommendations that the federal removal statute, 28 U.S.C. § 1442, should be amended to permit removal of FTCA claims from tribal courts to federal district courts.

2. Court decisions have differed on whether the "law of the place" should be tribal law for those incidents occurring on Indian land or state law as the phrase has historically been interpreted. The GAO has stated the issue but hasn't taken a position on how it should be interpreted or recommended a legislative remedy.

3. Legal arguments have been made that FTCA bars claims against tribal law enforcement officers for intentional torts, such as assault, battery, false imprisonment, and false arrest because tribal officers are not considered "investigative or law enforcement officers of the United States Government." The Department of Justice points out that whether tribal police or other law enforcement personnel were acting outside the scope of their authority as law enforcement officers is a difficult question which can only be determined by an evaluation of the particular facts and circumstances involved. We concur with the assessment and are prepared to assist the Department of Justice in identifying the situations that give rise to their concerns so that we can train and educate our law enforcement personnel to reduce or eliminate liability for intentional torts.

4. There are legal questions regarding FTCA coverage for tribal officials who exercise oversight over contracted programs but who do not participate in the day-to-day program operations. This is issue identified within the Nebraska and Washington State cases, and the Department of Justice, and the determination of whether to substitute a tribal official defendant can only be made on a case-by-case basis. The Department of Justice also states that it has no policy, formal or informal, denying FTCA coverage to tribal council members or senior administrative personnel. We are willing to work with the Department

of Justice to discuss coverage policies. This would help both tribes and insurance brokers better determine the likelihood of FTCA coverage for certain activities and would make it easier for tribes to avoid purchasing unnecessary levels of insurance coverage.

CONCLUSION

During the month of June, the Navajo Nation sponsored an event in Albuquerque, New Mexico, devoted to risk management practices, tort liability, health issues and other insurance related topics. The event was attended by over 400 tribal leaders and representatives from across the country. Because of the overwhelming response of the participants and the desire to interact with one another on these important issues affecting tribal sovereignty and ensuring that persons injured by Tribal government action have an adequate tribal remedy, the Navajo Nation will sponsor a similar event, next year. We feel that these types of events, the findings of the IHS Assessment Report, and the recommendations of the BIA and GAO Reports are important and will continue to foster discussions regarding tort claims and risk management concerns.

This concludes my prepared statement and I will be happy to answer any questions you may have.

BUREAU OF INDIAN AFFAIRS
LIABILITY INSURANCE STUDY
EXECUTIVE SUMMARY

Introduction

Congress, under Public Law 101-121 (Act), temporarily expanded the definition of federal employees to include tribes and tribal contractors. This action provided BIA-funded tribal organizations with liability insurance coverage under the Federal Tort Claims Act (FTCA) for self-determination programs funded under Public Law 93-638.

The Act also directed the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) to study the implications of providing liability insurance for tribes, on behalf of the respective Secretaries, and provide a report to the Committee on Appropriations of the United States Congress. The report was to outline options both for the provision of insurance and the projected cost thereof.

As a result of the above-described legislation, the Bureau of Indian Affairs engaged Foxx & Company and its two subcontractors, R. Navarro and Associates, San Diego, CA; and Joseph Eve & Company, Great Falls, MT; to conduct a study of liability insurance coverage at Indian organizations and to report the results of the study to BIA.

Results of Study

The results of the study, by objective, are as follows:

A. Development of a central database of liability exposure and losses unique to Indian contractors and grantees.

A central database of liability exposure and losses common to Indian contractors/ grantees was developed for those organizations visited and entities responding to the mail-in questionnaire. The database excludes the Navajo Nation which declined to be part of the study. The database includes information from approximately 75 tribes and tribal organizations which received the following amounts of funding from BIA and the Indian Health Service:

Funding	$126,033,750
Staff	2,753
Vehicles	2,244
Cost of Insurance	$ 2,578,801
General Liability	$ 1,081,154
Auto Liability	$ 1,254,287
Special Liability	$ 243,360

The study did not reveal any insurance liability exposures unique to Indian organizations. However, two of the organizations studied were exposed to injuries which occur in the performance of horse shows and/or rodeos. We were unable to establish a central database of liability losses that were covered by private insurance carriers. The loss data we did obtain related to only 12 of the 50 sites visited. We were also unable to gather any information relative to liability insurance losses covered by the FTCA and tracked by the General Accounting Office. This task could not be performed due to the lack of claims at the sites visited, the unavailability of claims information, and the General Accounting Office's inability or unwillingness to provide data on FTCA claims. In addition, we were unable to determine the losses covered by insurance carriers that related solely to Public Law 93-638 activities because most Indian organizations included in the study did not separate insurance coverage between Public Law 93-638-funded programs and other programs.

B. Evaluate the cost effectiveness of the present methods of providing liability insurance as:

1. Direct cost to contracts and grants
2. Inclusion in the indirect cost proposal

The direct purchase of general liability insurance and the inclusion of the cost in the indirect cost pool appears to be the most cost-effective method of purchasing insurance and recovering the cost. There were a number of organizations that charged insurance costs directly to programs under less than precise methods. The accurate direct charging of liability insurance to contracts and grants is very difficult, because general liability insurance coverage traditionally relates to an entire organization, not a specific grant or contract. Findings of this study revealed that there was at least one organization that paid for liability insurance out of tribal funds. This method resulted in no charge to BIA or IHS.

C. Evaluate the cost effectiveness of providing liability coverage for tribal contract/grant activities on a risk-management, self-insured basis.

Risk management/self insurance is a cost-effective method of providing liability insurance. However, it is the opinion of our insurance experts that premium payments in excess of $500,000 are necessary before self insurance is effective. Risk management is also an integral part of self-insurance and must be a permanent part of an organization's management philosophy. None of the entities visited had a self-insurance program. (The Navajo Nation has a self-insurance program but it declined to participate in the study.)

D. Evaluate the cost effectiveness for continuing coverage under Federal Tort Claims Act, including a statement of cost differences between FTCA and:

a. Direct purchase of insurance
b. Risk management and self insurance

We cannot evaluate the cost effectiveness of continuing coverage under FTCA because the cost required to administer FTCA was not available. We were unable to obtain information on the cost to administer FTCA from the Justice Department, the federal organization responsible for defending claims, or the General Accounting Office, the federal organization charged with the responsibility of tracking FTCA activity.

In addition, we cannot determine the cost differences between the direct purchase of insurance and self insurance/risk management because none of the sites visited had a self-insurance program. However, under the current circumstances, we believe that direct purchase is more cost effective than self insurance.

E. Conduct an actuarial study based on the actual loss history of grantees/ contractors.

An actuarial study based on the actual loss history of grantees/contractors could not be performed because sufficient claim information was not available at the sites visited, from the insurance agent, or the mail in responses. Also, the loss history for FTCA that was to be maintained by the General Accounting Office was not made available. In addition, the tribes and tribal organizations that participated in the study did not have liability insurance claims separated by Public Law 93-638 activities and other programs. Furthermore, the Navajo Nation, which receives approximately 20 percent of Public Law 93-638 funding, declined to participate in the study. Therefore, an actuarial study was not performed.

F. Perform a cost benefit and policy analysis of pooling and loss prevention compared with the purchase of traditional liability insurance.

Pooling, as compared to the traditional purchase of liability insurance, could be a more cost-effective method of obtaining liability insurance. However, pooling will only be practical when certain conditions are met.

G. Prepare a five-year funding plan for providing liability insurance.

The information needed to develop a five-year funding plan for liability insurance to insure Public Law 93-638 funded programs was not available at the sites visited. Liability insurance was purchased on the basis of organization-wide requirements, not on specific program requirements such as the Public Law 93-638 funded programs. Also, many of the organizations chose not to participate in the study; therefore, a valid sample of organizations receiving Public Law 93-638 funding could not be selected. In addition, the Navajo Nation, which receives approximately 20 percent of the Public Law 93-638 funding, declined to participant in the study. Finally, the true impact of the FTCA on the cost of liability insurance could not be assessed because most organizations participating in the study did not consider FTCA coverage when purchasing liability insurance. Accordingly, a valid five-year funding plan for liability insurance coverage for Public Law 93-638 funded activities could not be prepared.

Conclusions and Recommendations

Based on our study, it appears that all tribes and tribal organizations have some type of liability coverage and that the coverage is adequate based on the claims filed. However, Indian organizations were not adequately notified of the FTCA coverage. As a result, the FTCA coverage established by Public Law 101-121 and permanently extended by Public Law 101-512 had very little affect on the purchase of liability insurance by Indian organizations. The primary reason for the lack of knowledge of FTCA coverage is that BIA did not adequately inform the Public Law 93-638 contractors/grantees of the coverage provided by FTCA.

If BIA determines that it needs to continue coverage under FTCA, we recommend the following:

(1) Obtain a clear delineation of FTCA coverage; what is covered, what is not; from the Justice Department.

(2) Advise all Public Law 93-638 grantees/contractors of the actual coverage afforded by FTCA and inform them what coverage should be obtained through commercial carriers to supplement FTCA coverage.

(3) Perform an indepth study of insurance activities at several small, medium, and large Public Law 93-638 grantees/contractors to determine:

- Type of coverage
- Amounts of coverage
- Typical activities being covered by insurance

(4) Tailor liability insurance coverage for the above three types of entities and develop a prototype liability insurance policy working with a liability insurance specialist and provide these prototype policies to all Public Law 93-638 contractors/grantees.

(5) If it is determined that FTCA coverage is no longer required, we recommend that BIA develop proposed legislation that would rescind FTCA coverage for Public Law 93-638 grantees/contractors.

Executive Summary

Introduction

This study examines issues surrounding tribal experiences with private liability insurance and the Federal Tort Claims Act (FTCA). The primary purposes of the study are: (1) to examine access to private liability insurance by tribes and tribal organizations operating programs under the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93-638, and the coordination of that insurance with the immunity from tort liability for self-determination contractors and compactors and their employees provided under the FTCA; (2) to identify barriers to the appropriate pricing of private liability insurance; and (3) to recommend strategies that will assist tribes, tribal organizations, and other contractors and self-governance compactors to reduce the need for private liability insurance, as well as its cost.

Findings

The principal findings of the study are as follows:

1. The immunity from tort liability provided by the FTCA can be very beneficial for tribes and tribal organizations involved in P.L. 93-638 activities. Working with knowledgeable brokers, some tribes and tribal organizations report that they have been able to reduce their private liability insurance premiums substantially and, in some cases, completely drop certain types of coverage (e.g., medical malpractice) because of the FTCA.

2. Some tribes and tribal organizations involved in P.L. 93-638 contracting, however, may not have fully realized the benefits of the FTCA, because of the uncertainty, confusion, and lack of understanding among tribes, brokers, and insurance companies as to what activities are covered by the FTCA, when private sector coverage is unnecessary or duplicative, or how a FTCA claim proceeds through the system. This problem persists despite the publication of regulations under Title I of the Indian Self-Determination and Education Assistance Act Amendments ("1996 Regulations"), issued in June, 1996, which contain useful information about the FTCA for P.L. 93-638 contractors and compactors.

3. The difficulty that tribes and tribal organizations have in determining what private coverage they need to supplement their FTCA immunity may be compounded by what they describe as inconsistencies in how Federal personnel determine that particular claims are covered under the FTCA. Tribes, tribal organizations, and brokers report that there does not appear to be a uniformly applicable framework for coverage or a precedent-based decision-making system the results of which are available publicly. It is, therefore, hard for tribes, tribal organizations and insurers to judge the types of claims that might be covered under the FTCA and even harder to evaluate the extent to which private liability insurance is necessary or duplicative. This appears to be more of a problem with non-medical claims.

4. Notwithstanding the perception of self-determination contractors and brokers that there is no way to predict when the FTCA will apply to a particular tort claim because this decision requires a case-by-case analysis, a general framework for analysis of the FTCA's applicability to tort claims involving P.L. 93-638 contractors and their employees can be constructed that provides some assistance in assessing the likelihood that private liability insurance may be needed.

5. Tribes and tribal organizations report that the lines of communication between themselves and the Federal agencies involved in FTCA decision-making need to be improved. Tribes and tribal organizations report difficulties in determining a claim's status and resolution and receiving timely responses to tribal inquiries as to whether a claim will be covered or not by the FTCA.

6. Many insurance companies are unfamiliar with the FTCA and its applicability to self-determination contractors. Other insurers are uncertain about the reach of the FTCA and the process for filing an FTCA claim. As a result, some insurers may misconstrue, underestimate, or disregard the value of the FTCA in designing private liability insurance coverage for tribes and tribal organizations and in determining premiums to be charged for that insurance coverage. Because the level of sophistication about tribal tort immunity through the FTCA varies substantially, the number of insurers willing to write tribal coverage, while growing, is still relatively small. This is surprising because insurers routinely sell coverage to state and local governmental entities that have basic grants of immunity under statutes that are similar to the FTCA and therefore would have the same need as tribes for only supplementary private insurance coverage.

Recommendations

The principal recommendations of the study are as follows:

1. A clearinghouse could be created through which tribes and tribal organizations could share information about their experiences with the

purchase of private liability insurance. In addition, to facilitate networking among tribes, a web page could be created. The web page could include general information on the FTCA and list the designated regional contact people within the responsible agencies who can be contacted for more specific assistance.

2. The Secretaries of Health and Human Services and the Interior, in conjunction with the Department of Justice, could conduct informational meetings in various regions to acquaint tribes, tribal organizations, brokers, and insurance companies with the basic principles of immunity from tort liability provided for self-determination contractors under the FTCA. The purpose of these meetings would be: (a) to assist tribal self-determination contractors to better understand the immunity from tort liability provided under the FTCA in order to improve their ability to purchase non-duplicative private liability insurance; and (b) to assist brokers and insurance companies to develop appropriate insurance products.

3 Informational materials could be developed for distribution to P.L. 93-638 contractors. These materials should be written in clear and understandable layperson's language. They would generally describe the immunity provided to self-determination contractors under the FTCA and identify (to the extent possible) the types of activities that may not be protected so as to assist tribes in understanding the extent to which they may need supplemental private liability insurance. These materials could be used by the tribes to share with brokers and representatives of insurance companies who are unfamiliar with the FTCA. The *Handbook for Tribes on How to Reduce Private Liability Insurance Costs* (which is part of this report) and the 1996 Regulations could serve as starting points. To maximize the usefulness of these materials for tribes in their negotiations with insurance companies, any guidance should be issued by the Federal government, since privately issued materials on the FTCA may be perceived as less authoritative.

4. Principles for determining more clearly when private liability insurance duplicates tribal FTCA immunity could be developed and communicated to all P.L. 93-638 contractors and compactors. In addition, examples of insurance contract language that does not duplicate the FTCA could be identified and shared with and among tribes, tribal organizations, brokers, insurance companies, and the Federal government.

5. If they have not yet done so, tribes and other P.L. 93-638 contractors and compactors should designate a tribal tort claims liaison with the Federal agencies for purposes of the FTCA, as the 1996 Regulations instruct. Similarly, the agencies should provide the tribal contractors with a list of key

regional contact persons who can act as resources for the tribal contractors on FTCA matters.

6. Misunderstandings and confusion about FTCA could be reduced by improving communications between self-determination contractors and Federal agencies.

7. More consistent interpretation and application of policies and procedures within and across Federal agencies would reduce confusion about FTCA issues. For instance, consideration could be given to developing consistent internal agency procedures for determining whether a claim will be covered under the FTCA. In addition, agencies could develop standardized responses to tribes that request information about the FTCA from the government. They also could develop a "to-whom-it-may-concern" letter verifying and explaining FTCA coverage of P.L. 93-638 activities, which could be used by the tribes when dealing with brokers, insurance companies, and other entities that require verification of FTCA coverage.

8. To the extent possible, a body of general information about claims filed under the FTCA could be developed. An on-line claims registry could be organized by type, location and disposition of claim. This registry would be for internal agency use to facilitate consistency in interpreting the FTCA.

9. Consideration could be given to the creation of a publicly available data base containing the same type of information as would be in the claims registry but, if necessary to maintain confidentiality, available without tribal or individual identifying information.

10. The Federal agencies could consider issuing additional clarification on FTCA coverage of certain activities which have been the source of particular confusion for tribal contractors, such as employment-related torts.

Conclusions

After a number of years in which tribes and tribal organizations experienced difficulty in finding private liability carriers willing to insure them at all, let alone at a reasonable prices, today's marketplace offers both opportunities and challenges. Some tribes have leverage to negotiate lower rates, and they have choices of insurers. They often have more than one carrier vying for their business, as the wide variety of enterprises in which the tribes are engaged are attractive sources of

income to insurance companies.

The grant of immunity from tort claims provided under the FTCA for P.L. 93-638 activities should have resulted in tribes and tribal organizations paying less for private insurance. However, a lack of awareness of the applicability of the FTCA and/or a full understanding of its scope appear to have prevented some tribes from doing so. One of the most important steps that tribes can take to lower their private liability costs is to become better informed about the fundamentals of the FTCA and the kind of commercial insurance they need to supplement the immunity from tort claims that the FTCA provides self-determination contractors and compactors and their employees. Once they become more educated consumers, tribes can use that information to negotiate more effectively with brokers and insurance companies. Among the tribes in our study were some whose understanding of the FTCA enabled them to purchase cheaper private liability insurance that does not duplicate the coverage already provided under the FTCA. Knowledgeable brokers have worked closely with some tribes and tribal organizations to develop insurance products that meet those tribes' needs and significantly reduce their private insurance costs.

The Federal government can help tribes and tribal organizations by providing more accessible information about the FTCA in a form that is simple and useful to laypersons. Tribes and tribal organizations can help each other by sharing information about their experiences in obtaining appropriate and reasonably priced insurance.

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INDIAN TRIBAL TORT CLAIMS AND RISK MANAGEMENT ACT OF 1998

1999 TRIBAL SURVEY

TRIBE:_____

Name of Individual Filling Out This Form:_____
Your street address:_____ **City:**_____
State:_____ **Zip:**_____ **Telephone:**_____

LIST other tribal and non-tribal sources that assisted you in completing this survey:_____

Name of tribe's insurance broker/agent:_____
His/Her street address:_____
City:_____ **State:**_____ **Zip:**_____ **Tel:**_____
LIST effective dates of coverage(s):_____

#	SURVEY QUESTIONS (use additional sheets, if necessary)	YES	N
1a	Does your tribe have insurance coverage for governmental activities? (Check Yes or No)		
1b	If no, please explain:		
2a	Is your Tribe engaged in gaming activity?		
2b	If yes, does the gaming operation carry insurance coverage separate from other tribal government activity?		
3a	Are you willing to provide a copy of the cover sheet of your tribe's insurance policy(ies)?		
3b	If yes, please attach to this survey a copy of the insurance policy cover sheet.		
4a	Do any of your tribe's insurance policies contain endorsements or clauses that address how the defense of sovereign immunity will be handled with claims made under the policies?		
4b	If yes, please explain the circumstances in which that defense may or shall be raised. Also, please indicate who makes the decision to raise the defense. Attach a copy of applicable policy clauses and/or endorsements.		
5a	Do any of your tribe's insurance policies contain clauses or endorsements that address how the insurance coverage relates to claims covered by the Federal Tort Claims Act?		
5b	If yes, please attach examples of such clauses and/or endorsements.		

ANALYSIS OF LOSS DATA

3 Year History

	Number of Claims	Number of Claims Paid	Number of Claims Denied/Unpaid
General Liability			
Auto Liability			
Law Enforcement Liability			
Workers' Compensation			
Other Liability			

PAID CLAIMS

	Number of Claims Paid	Total Amount Paid	Total Amount of Exposure or Loss
General Liability			
Auto Liability			
Law Enforcement Liability			
Workers' Compensation			
Other Liability			

DENIED / UNPAID/REFERRED CLAIMS

	Number of Claims	No Negligence	Excluded From Coverage	Sovereign Immunity Defense	Statute of Limitations	Jurisdictional Bar
General Liability						
Auto Liability						
Law Enforcement Liability						
Workers' Compensation						
Other Liability						

INSURANCE COVERAGE ASSESSMENT

Insurance Coverages Available	**Coverage Provided by Policy**	**Coverage Provided by FTCA**	**Occurrence Limit**
General Liability	yes□ no□	yes□ no□	
Employer Benefit Liability	yes□ no□	yes□ no□	
Employment Practices Liability	yes□ no□	yes□ no□	
Automobile Liability	yes□ no□	yes□ no□	
Tribal Officials Errors and Omissions Directors & Officers Errors and Omissions	yes□ no□ yes□ no□	yes□ no□ yes□ no□	
Police Professional Liability	yes□ no□	yes□ no□	
Other Professional Liability EMTs	yes□ no□ yes□ no□	yes□ no□ yes□ no□	
Umbrella Liability	yes□ no□	yes□ no□	
Workers' Compensation	yes□ no□	yes□ no□	
Other Liability - please identify:_____	yes□ no□	yes□ no□	

RISK ASSESSMENT

PROJECTED EXPOSURE TO LIABILITY

Please list those tribal programs which are funded by PL-638 or self-governance compacts	Please list those tribal economic enterprises funded by the Tribe

Statement of Barry Asse
Development Division

The Indian Self-Determination and Education Assistance Act was passed in 1975 to encourage tribes to participate in and manage programs that for years had been administered on their behalf by the departments of the Interior and of Health and Human Services. The act authorizes tribes to take over the administration of such programs through contractual arrangements with the agencies that previously administered them: Interior's Bureau of Indian Affairs and Health and Human Services' Indian Health Service.[1] For the Bureau, the programs that can be contracted by tribes include law enforcement, education, social services, road maintenance, and forestry, and for the Health Service, the programs include mental health, dental care, hospitals, and clinics.

Under the first 15 years of the Self-Determination Act, tribal contractors generally assumed liability for accidents or torts (civil wrongdoings) caused by their employees. However, in 1990, the federal government permanently assumed this liability when the Congress extended Federal Tort Claims Act (FTCA) coverage to tribal contractors under the Self-Determination Act. Originally enacted in 1946, FTCA established a process by which individuals injured by federal employees could seek compensation from the federal government. As a result of extending this coverage to tribal contractors, individuals injured by tribal employees may, under certain circumstances, seek compensation from the federal government. For example, if while responding to a call for assistance, a tribal police officer is involved in an automobile accident, the injured parties may be able to seek compensation from the federal government for their personal injuries and property damage.

[1]Throughout this report, the term "tribes" will refer both to tribes and tribal organizations eligible to contract programs under the Indian Self-Determination and Education Assistance Act. Also, the term "contracts" will refer to contracts, grants, self-governance agreements, cooperative agreements, or annual funding agreements entered into pursuant to the Indian Self-Determination and Education Assistance Act, as amended.

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To gain a better understanding of how this coverage works, you asked us to review and report on various aspects of it. We provided this Committee with our report on July 5, 2000.[2] Our testimony today will focus on the FTCA claims history for tribal self-determination contracts and FTCA coverage issues that are unique to tribal contractors.

In summary:

- Data on FTCA claims involving tribal contractors are not readily available because neither Interior nor Health and Human Services is required to track these claims separately from FTCA claims involving federal employees. However, in response to our request for claims data, these departments identified 342 claims, filed from fiscal years 1997 through 1999, that arose from programs contracted from Interior's Bureau of Indian Affairs and Health and Human Services' Indian Health Service. Total damages claimed were about $700 million. About two-thirds of these claims involved Bureau programs, most notably law enforcement. The remaining one-third involved Health Service programs, of which about one-half involved patient care. At both agencies, these claims involved a small number of tribes. Although some of these claims remain open, about 70 percent (involving about $333 million in claimed damages) have been brought to closure at a cost of more than $2 million (84 percent paid by the federal government, 16 percent paid by private insurers). Of the claims brought to closure, 127 resulted in settlement payments and 108 were denied.

- Our review identified a number of issues unique to FTCA coverage for tribal contractors:

  - On the administrative side, the federal government may be paying more than necessary to resolve claims involving tribal contractors. To the extent that tribes use federal funds to purchase private liability insurance that duplicates their FTCA coverage, it is possible that the federal government is paying twice—once

[2] *Federal Tort Claims Act: Issues Affecting Coverage for Tribal Self-Determination Contracts* (GAO/RCED-00-169, July 5, 2000).

for tribes' insurance premiums and once to settle tribes' FTCA claims. The potential for duplicative liability coverage exists for tribal contractors because of tribes' long-standing practice of carrying private insurance to cover a wide range of activities, including those now covered under FTCA. Neither Interior nor Health and Human Services routinely checks to determine whether tribal contractors have private liability insurance that could cover these claims. To protect against having the government pay more than necessary to resolve these claims, our July 2000 report recommended that the departments routinely check for duplicative liability insurance. The Department of Health and Human Services agreed with our recommendation and the Department of the Interior acknowledged that such duplication might occur.

- On the legal side, several issues have emerged from recent lawsuits that illustrate areas for which FTCA coverage is not a perfect fit for tribal contractors. For example, under FTCA, federal courts have exclusive jurisdiction to resolve claims brought under the act, and the act provides for the removal of such claims from state courts. However, there is no similar removal authority for such claims filed in tribal courts. Therefore, cases filed in tribal court can be problematic because FTCA does not provide the necessary authority to remove such cases from tribal court to federal court, where jurisdiction resides.

Background

The Federal Tort Claims Act was enacted in 1946 and provides a limited waiver of the federal government's sovereign immunity. It specifies the instances in which individuals injured by the wrongful or negligent acts or omissions of federal employees can seek restitution and receive compensation from the federal government through an administrative process and, ultimately, through the federal courts. The Department of Justice handles lawsuits arising from FTCA claims.

The Indian Self-Determination and Education Assistance Act of 1975 allowed Indian tribes to contract to administer certain federal Indian programs. As originally enacted, tribal contractors assumed liability for torts caused by tribal employees performing official duties. The act authorized the Secretaries of the Interior and of Health and Human Services to require that tribal contractors obtain private liability insurance. People injured by the actions of tribal contractors could file claims against tribal employees or their tribes.

By the late 1980s, the Congress recognized that some tribes were using program funds to purchase private liability insurance, which reduced the funds available to provide direct program services. Thus, the Congress amended the act in 1988 and required that beginning in 1990 the Secretaries of the Interior and of Health and Human Services obtain or provide liability insurance or equivalent coverage for the tribes. Also in the late 1980s, the Congress began to enact statutes extending FTCA coverage to tribal self-determination contracts. In 1990, this coverage was extended permanently, thus giving injured parties the right to file tort claims against and recover monetary damages from the federal government for injuries or losses resulting from the negligent actions of tribal employees.

Federal Indian programs that tribes can contract under the Self-Determination Act fall under the jurisdiction of the departments of the Interior and of Health and Human Services. Within these departments, the primary agencies responsible for administering Indian programs are the Bureau of Indian Affairs and the Indian Health Service, which have a combined annual appropriation exceeding $4 billion. Indian tribes administer about one-half of these programs, or about $2 billion annually. As of March 2000, there were 556 federally recognized tribes. Agency officials estimate that nearly all of the federally recognized tribes administer at least one contract from the Bureau or the Health Service, either directly or as a member of a tribal consortium.

The Bureau and Health Service programs administered by a tribe under the Self-Determination Act may represent only a portion of that tribe's total activities. The other programs tribes operate outside of the Self-Determination Act may include other federal programs, such as federal housing assistance for Native Americans under the Department of Housing and Urban Development, early childhood educational and care programs under the departments of Education and of Health and Human Services, and tribal enterprises, such as gaming operations and smokeshops or convenience stores. These programs have generally not been extended FTCA coverage. The tribes themselves are liable for any injuries or damages caused by these programs, and they may choose to protect themselves against this liability by purchasing private liability insurance.

Several Hundred Claims Have Been Filed Involving Tribal Self-Determination Contracts

Data on FTCA claims involving tribal contractors are not readily available because neither Interior nor Health and Human Services is required to track these claims separately from FTCA claims involving federal employees. However, in response to our request for claims data, these departments identified 342 claims filed from fiscal years 1997 through 1999 for programs contracted by tribes from the Bureau and the Health Service. Total damages claimed were $706 million (see table 1).

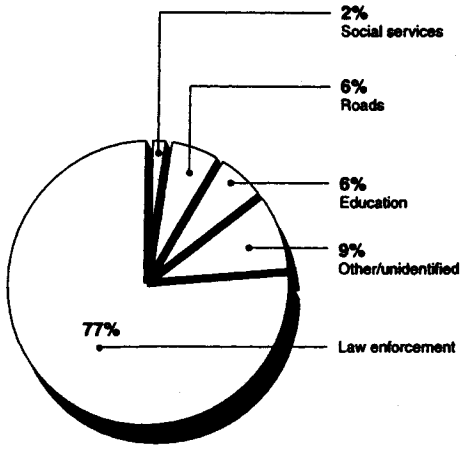
Table 1: Claims Arising From Tribally Contracted Programs From the Bureau of Indian Affairs and the Indian Health Service, Fiscal Years 1997-99

Dollars in millions

Program agency	Number of claims for tribally contracted programs	Percentage of total claims	Amount claimed	Percentage of total amount
Bureau of Indian Affairs	228	67	$219	31
Indian Health Service	114	33	487	69
Total	**342**	**100**	**$706**	**100**

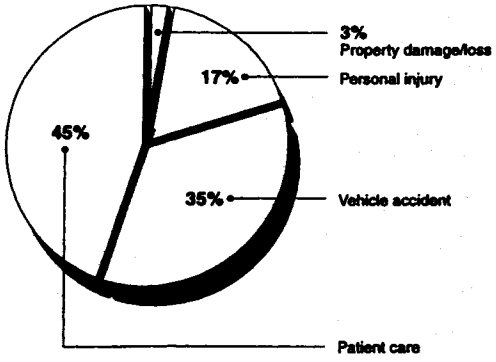
About two-thirds of the claims involved Bureau programs, most notably law enforcement (see fig. 1).

Figure 1: Claims Arising from Tribally Contracted Programs From the Bureau of Indian Affairs, by Program Type, Fiscal Years 1997-99



The remaining one-third of the claims involved Health Service programs, of which 45 percent involved patient care (see fig. 2).

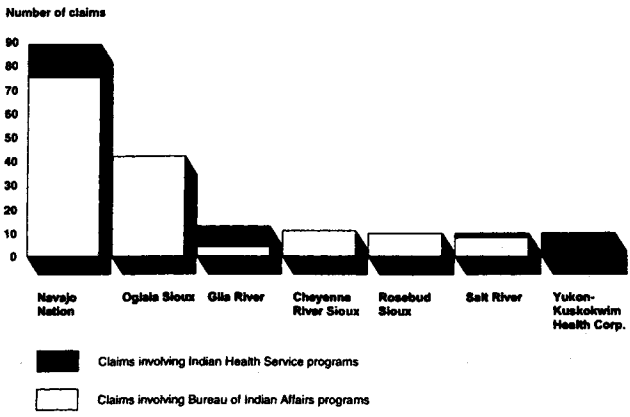
Figure 2: Claims Arising from Tribally Contracted Programs From the Indian Health Service, by Type of Claim, Fiscal Years 1997-99



Although two-thirds of the claims involved Bureau programs, they accounted for only about one-third of the total dollar amount claimed. The 228 claims involving Bureau programs ranged from a low of $39 to a high of $50 million, with a median claim amount of about $71,000. The 114 claims involving Health Service programs ranged from a low of $75 to a high of $100 million, with a median claim amount of $1 million.

The claims involved tribally contracted programs for 76 contractors (60 of the 556 federally recognized tribes and 16 organizations). The claims for the Bureau programs involved 46 contractors (45 tribes and 1 organization). The claims for the Health Service programs involved 40 contractors (25 tribes and 15 organizations), 10 of which also were involved in claims for Bureau programs. The Navajo Nation, the largest tribe, was the tribal contractor involved in the largest number of claims at 89—26 percent of the total number of claims. About two-thirds of the contractors were involved in only one or two claims. Seven contractors, each with 10 or more claims, accounted for over half the total number of claims (see fig. 3).

Figure 3: The Seven Contractors Involved in the Most Claims, Fiscal Years 1997-99



A number of reasons were provided to explain why so few tribes had claims involving their self-determination programs. According to agency officials, even though FTCA coverage was extended about 10 years ago, it is still not well-known or understood by attorneys, tribes, or potential claimants. Also, to the extent that tribes continue to carry private liability insurance that duplicates their FTCA coverage, claimants may be referred to private insurers rather than to the federal government for compensation.

By the time of our review, the departments of the Interior and of Health and Human Services had denied 172 of the 342 claims and had awarded damages on 103; 67 claims were still pending.[3] Lawsuits were filed for 84 of the claims that had been denied or were still pending. Of these lawsuits, 13 had been dismissed, 24 resulted in damage awards, and 47 are still pending. Although some of the claims and lawsuits remain open, about 70 percent of claims have been brought to closure at a cost of about $2 million—$1.7 million paid by the federal government and $327,500 paid by private insurers—out of the $333 million claimed in these cases. Of the claims brought to closure, either administratively or through litigation, 127 resulted in settlement payments and 108 were denied. According to agency officials, the small, simple claims for minor incidents, such as a "fender bender," are generally resolved quickly, while the large, complex claims may take longer to resolve. Although only $2 million has been paid to date to resolve tribal claims filed from fiscal years 1997 through 1999, this figure will likely increase as the remaining claims are resolved. In aggregate, the percentage of tribal claims approved and the amount awarded are comparable with the resolution of other FTCA claims at Health and Human Services.[4]

[3]The status of the claims filed changes frequently as new administrative determinations are made, lawsuits are filed, or settlement agreements are reached. The data presented in this report were collected at various offices between November 1999 and May 2000.

[4]A similar comparison was not possible for Interior because of the lack of agencywide data on tort claims disposition.

FTCA Coverage for Tribal Self-Determination Contracts Presents Some Unique Issues

Our review identified a number of issues unique to FTCA coverage for tribal contractors. The federal government may be paying more than necessary to resolve claims involving tribal contractors because, during the administrative review of these claims, neither Interior nor Health and Human Services routinely checks to determine whether tribal contractors have private liability insurance that could cover these claims. Although this check is required by the Department of Justice for claims that are litigated, and in fact has been done for some claims at the administrative level, most claims have been resolved without a check for duplicative insurance. To protect against having the government pay more than necessary to resolve these claims, our July 2000 report recommended that the departments routinely check for duplicative liability insurance.

Several unique legal issues have also emerged from recent litigation. These issues illustrate areas for which FTCA coverage is not a perfect fit for tribal contractors. For example, under FTCA, federal courts have exclusive jurisdiction to resolve claims brought under the act, and the act provides for the removal of such claims from state courts. However, there is no similar removal authority for such claims filed in tribal courts. In addition, other legal issues have arisen about whether state law or tribal law should be used to adjudicate claims, whether tribal law enforcement officers should be considered federal law enforcement officers, and whether FTCA coverage has been extended to senior tribal officials, such as tribal council members.

The Federal Government May Be Paying More Than Necessary to Resolve Claims Involving Tribal Contractors

The federal government may be paying more than necessary to resolve claims involving tribal contractors because, during the administrative review of these claims, neither Interior nor Health and Human Services routinely checks to determine whether tribal contractors have private liability insurance that could cover these claims. In 1975, when

tribes began contracting to operate federal programs, they also assumed liability for those programs. Accordingly, many tribes acquired private insurance as one means to protect themselves against tort claims. The extension of FTCA coverage to tribal contractors in 1990, however, did not prohibit tribes from continuing to acquire private insurance and thus created the potential for duplicative liability coverage. Subsequent amendments to the Self-Determination Act in 1994 reiterated tribes' right to obtain private insurance, thereby perpetuating the risk of duplication. Although comprehensive liability insurance is no longer needed for tribal self-determination programs, tribes still need some private insurance as protection against claims not covered under FTCA.[5]

Unless tribes have taken steps to modify their insurance policies to specifically exclude acts covered under FTCA, they most likely have liability coverage that duplicates their FTCA coverage. An analysis of 20 private insurance policies, published in February 1998 by the George Washington University, found that none of these policies specifically excluded activities covered under FTCA.[6] To the extent that tribes use federal funds to purchase private liability insurance that duplicates their FTCA coverage, it is possible that the federal government is paying twice—once for tribes' insurance premiums and once to settle tribal FTCA claims.

For claims that go to litigation, Justice's practice is to ascertain whether the affected tribe has private insurance covering the claim. If so, Justice will look to private insurers to resolve these claims when it is in the best interests of the United States to do so. For claims at the administrative level, neither Interior nor Health and Human Services has policies or procedures in place that require personnel handling FTCA claims to routinely check for duplicative insurance. Although staff at Interior's headquarters told us that

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[5]Examples of claims not covered under FTCA include those arising from activities outside of a tribal contractor's scope of employment, non-self-determination activities, violations of constitutional rights, subcontractor activities, breaches of contract, and workers' compensation. In 1998, the Congress directed the Secretary of the Interior to conduct a study of tribes' insurance (P.L. 105-277, title VII, Oct. 21, 1998). At the time of our review, the Secretary had not released the results of that study.

[6]*Assessment of Access to Private Liability Insurance for Tribes and Tribal Organizations With Self-Determination Contracts/Compacts*, The George Washington University Medical Center, Center for Health Policy Research (Feb. 1998).

they follow Justice's practice of checking for duplicative insurance, we found that only two solicitor offices routinely do so.[7] At these two locations, administrative and/or legal responsibilities for several claims were turned over to private insurers. Three of these claims have been resolved and resulted in payments from private insurance companies totaling about $327,500, or about 30 percent of the payments made by these two offices (3.5 percent at one office and 100 percent at the other). This amount also represents about 16 percent of all payments made to date for claims involving tribal contractors from fiscal years 1997 through 1999. Similarly, at Health and Human Services, the Claims Branch and the Office of General Counsel do not routinely check for duplicative insurance.

The departments of the Interior and of Health and Human Services agreed that duplication might occur. We believe that as long as federal funds continue to be used by tribes to purchase private liability insurance that duplicates their FTCA coverage, the government should receive the benefits of those policies. As a result, we recommended that the Secretaries of the Interior and of Health and Human Services direct their claims processing personnel to determine if duplicative private liability insurance exists and tender the claims to the private insurers when it is in the best interest of the United States to do so.

Unique Legal Issues Have Arisen Since FTCA Coverage Was Extended to Tribes

Four unique legal issues have emerged from recent litigation of tribal FTCA claims. These issues illustrate areas for which FTCA coverage is not a perfect fit for tribal contractors. Two of these issues are currently being litigated in federal courts around the country. The four legal issues are discussed briefly below.

[7]For the remaining seven solicitor offices, four had made payments on claims involving tribal contractors without routinely checking for duplicative private insurance. However, one of these four offices handles claims primarily from the Navajo Nation, which is self-insured. The other three solicitor offices, which received a total of eight claims involving tribal contractors during fiscal years 1997 through 1999, had not made any payments on those claims at the time of our review.

- FTCA does not provide statutory authority for the removal of FTCA cases filed in tribal courts. Under the act, federal courts have exclusive jurisdiction to hear cases arising from FTCA claims, and the act provides statutory authority for the removal of such cases filed in state courts, yet no similar removal authority exists for such cases filed in tribal courts. Cases filed in tribal court can be problematic because FTCA does not provide the necessary authority to remove such cases from tribal court to federal court, where they belong.

- Legal questions have been raised about whether tribal FTCA claims should be adjudicated on the basis of tribal law or state law. Under FTCA, the federal government is liable for the negligent acts of its employees to the extent that a private person would be liable "in accordance with the law of the place where the act or omission occurred."[8] Recent court decisions have differed on whether the law of the place should be tribal law for those incidents occurring on Indian land or state law as the phrase has historically been interpreted.

- Legal arguments have been made recently that tribal law enforcement officers enforcing tribal laws should not be considered federal law enforcement officers. Under FTCA, claims for intentional torts, such as assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution, are barred except for claims against "investigative or law enforcement officers of the United States Government." If tribal law enforcement officers are not considered federal law enforcement officers, then claims for intentional torts involving those officers would be barred under FTCA.

[8]28 U.S.C. 1346(b) and 2672.

- A recent decision by the Department of Justice not to provide FTCA coverage for tribal council members involved in litigation arising from the tribe's law enforcement contract with the Bureau has raised legal questions about the coverage for indirect tribal employees. Since representation decisions are made by the Department of Justice on a case-by-case basis, tribes do not always know which tribal employees are covered and when. This makes it difficult for them to fully utilize their FTCA coverage.

Mr. Chairman, this concludes my statement. We would be pleased to respond to any questions that you or other Members of the Committee may have at this time.

Contacts and Acknowledgments

For information about this testimony, please contact Chet Janik or Jeff Malcolm at (202) 512-3841.

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TESTIMONY OF MICHAEL WILLIS, ATTORNEY,
HOBBS, STRAUS, DEAN & WALKER
ON BEHALF OF BRISTOL BAY AREA HEALTH CORPORATION
SENATE COMMITTEE ON INDIAN AFFAIRS
HEARING ON BIA AND GAO REPORTS ON
TRIBAL RISK MANAGEMENT
JULY 12, 2000

Good afternoon, Mr. Chairman and members of the Committee. My name is Michael Willis. I am an attorney with Hobbs, Straus, Dean & Walker, representing the Bristol Bay Area Health Corporation (BBAHC). BBAHC is a tribal consortium which operates the Indian Health Service ("IHS") hospital in Kanakanak, Alaska, and provides health services to 33 Alaska Native Villages in the 45,000 square mile Bristol Bay region. As a result of the statutory extension of the Federal Tort Claims Act ("FTCA") coverage to tribes, tribal organizations and tribal consortia, BBAHC has been protected by the provisions of the FTCA against any claims resulting from the performance of functions under its health care contracts and compacts with IHS pursuant to the ISDEAA since October 23, 1989.

First, the BBAHC emphasizes that FTCA coverage for Indian Self-Determination and Education Assistance Act (ISDEAA) activities was and remains an important and positive policy decision because contractors and compactors would otherwise have to divert program funds to obtain medical malpractice insurance and general liability coverage. In BBAHC's case, since all of its health care activities are provided in accordance with its self-governance agreement with the Indian Health Service, BBAHC no longer carries medical malpractice insurance.

As for general liability, contractors and compactors must still obtain some type of private insurance because the FTCA does not cover all risks associated with all their activities. For this reason, BBAHC has continued to carry some private insurance. However, since the primary purpose of this insurance coverage is to apply in cases not covered by the FTCA, BBAHC does not use IHS contract funds to pay premiums for this coverage. Although BBAHC has been advised by its broker that its premium rate reflects FTCA coverage, BBAHC has been advised that rate reductions are generally not being passed on to tribes based on the extension of the FTCA.

BBAHC has also found that it remains difficult to define precisely what is and what is not covered by the FTCA, leaving gray areas of residual risk at the fringe. A conservative risk management approach (not ignorance or inertia as the GAO report suggests) provides incentives to ISDEAA contractors and compactors to obtain private insurance coverage for those gray areas as well as for those activities performed outside the ISDEAA agreement. The difficulty of assessing the level of residual risk may be one of the reasons why premium rates have not been significantly reduced for ISDEAA contractors and compactors purchasing insurance coverage to supplement FTCA protection.

While BBAHC believes that the extension of the FTCA to tribal contractors has been significantly supportive of the federal policy of tribal self-determination (recently reconfirmed by the Senate in Senate Resolution 277), it has requested us to bring your attention a recent development which has raised a question as to whether the Department of Justice is fully supportive of these laws.

The United States Attorney for the District of Anchorage has demanded that BBAHC indemnify the United States for all or part of a $2.8 million settlement negotiated by the United States Attorney for a

claim involving BBAHC filed in accordance with the FTCA. (A copy of the demand has been provided to this Committee). Recently, we learned that the United States Attorney has also urged the Indian Health Service to make a claim on this same basis against BBAHC under the Contract Disputes Act. We understand that to date IHS has declined to take such action.

The demand by the U.S. Attorney stems from an incident that occurred on November 27, 1993, which resulted in injuries to a child attending a social function at a BBAHC facility. The child's family filed a claim which DHHS and the United States Attorney agreed was covered by the FTCA. BBAHC cooperated with the United States Attorney in his investigation of the claim. In August 1997 the claim was settled by the United States Attorney for $2,800,000.

At the time of the incident giving rise to the claim BBAHC maintained a policy of general liability insurance which the United States Attorney claims is duplicative of coverage afforded BBAHC by extension of the FTCA. (We understand that the insurance policy applicable in 1993 was obtained to protect BBAHC against claims falling outside the scope of the FTCA and that BBAHC's broker at that time has signed a declaration stating that the premium cost to BBAHC reflected the existence of FTCA coverage.)

The United States Attorney tendered defense of the tort claim to BBAHC's private insurance company, Continental Insurance Company. The insurance company refused. Following settlement of the claim with the injured child's family, the United States filed suit against the insurer (U.S. v. CNA Financial Corp., U.S.D.C. Alaska, CA No. A98-285CV) seeking recovery of the settlement amount, attorneys fees, interest and expenses. We understand that CNA/Continental denies that the United States has any rights under the policy applicable in 1993.

If the United States Attorney continues to pursue the theory that the United States is an implied insured party under any policy of insurance obtained by a self-governance tribe or Title I contractor, then:

(1) no benefit and considerable additional risk for tribes results from the extension of FTCA coverage (the tribe or their insurers may be liable to the United States when the government attorneys represent them and settle or lose a case without the tribe having any control over the litigation or input into the terms of the settlement); and

(2) a primary purpose of Congress in extending FTCA coverage to reduce insurance costs to tribes operating programs under the ISDEAA is defeated. Tribes should not be required either to use inadequate "contract support funds" or dip into program funds in order to pay excessive insurance premiums. If the government is an additional insured under insurance policies obtained by tribes, there obviously is no reason for the insurer to reduce the premium based on the FTCA coverage. See S. Rep. No. 274, 100th Cong., 1st Sess. 8-13, (1987) (identifying the failure of the federal agencies to provide funding for overhead costs, such as liability insurance, which tribal contractors incur over and above the agency program contract, as one of the primary obstacles to full implementation of the self-determination policy).

It is our opinion that existing law does not permit such recovery against tribes by the United States.

In passing the 1988 amendments to the ISDEAA, Congress included a new statutory requirement in Section 106(a)(2) that funding for overhead costs "shall" be added to the program funding provided under the contract One of the principal items of so-called "contract support costs" was, and is, the cost of liability insurance. Since the federal government self-insures,

agency budgets do not include funding for insurance. Congress also sought to address the inadequacy of funding for "contract support" by shifting the requirement to obtain liability insurance from contractors under the ISDEAA to the Secretary of the Interior and the Secretary of Health and Human Services. Public Law 100-472 ("the 1988 Amendments") added the requirement that

> Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost effective basis for Indian tribes, tribal organizations and tribal contractors carrying out contracts... [under the ISDEAA].

The statute required the Secretary, in obtaining such insurance, to "take into consideration the extent to which liability under such contracts or agreements is covered by the Federal Tort Claims Act." See 25 U.S.C.A. § 450f(c)(1) (West Supp. 1998).

Notwithstanding the direction to the Secretary of the Interior to provide for general liability insurance on a national basis, the Secretary failed to take action. In the FY 1989 appropriations legislation Public Law 101-121 for the Department of the Interior and Indian Health Service, Congress temporarily extended the FTCA coverage to all liability claims against self-determination contractors for one year. When the Departments failed to take further effective steps under Section 102(c) of the ISDEAA in FY 1989, the Congress acted to extend the FTCA permanently to such claims in Section 314 of Public Law 101-512. The House Committee explained that in the light of the Department's failure to carry out the instructions from the Committee ". . . the Committee has no choice but to provide the required liability coverage on a permanent basis by extending the [FTCA] coverage." H. Rep. No. 101-789, at 72 (1990). The Senate Report expressly stated that the permanent extension of the FTCA coverage to general liability claims against self-determination

contractors was "to meet the liability insurance provisions of Public Law 93-638, as amended." (Section 102(c)). S. Rep. No. 101-534, at 153-154 (1990). The Conference Report confirmed that the congressional intent in extending the FTCA was to satisfy the obligation of the federal agencies to provide general liability insurance under the ISDEAA. 136 Cong. Rec. H. 1344 (October 27, 1990).

By maintaining the policy that any liability insurance acquired by a tribal contractor to protect itself from claims which may fall outside the scope of the FTCA must also insure the United States, the Department of Justice defeats the congressional purpose of extending FTCA coverage to tribal contractors under the ISDEAA. No reduction in premium cost could be expected in that case. We do not know whether the Department of Justice has taken this position with other tribes, but we do understand that it is DOJ policy to tender the defense of FTCA claims to insurance companies which have issued liability policies to tribal contractors under the ISDEAA.

The concern that the United States will demand indemnification from tribes (and/or their insurers) for claims settled under the FTCA is not limited to BBAHC. The issue has been discussed recently in self-governance compact negotiations with the IHS in Alaska. In order to preserve the intended FTCA protection for tribal organizations administering health programs under self-governance agreements with the Indian Health Service, tribal co-signers of the Alaska Tribal Health Compact have proposed that the FY 2001 Annual Funding Agreements ("AFA") under the Compact include a provision to address this problem. The provision states that:

> Programs, functions, services, and activities provided under this AFA are covered under the Federal Tort Claims Act... and any insurance coverage obtained by the [tribal organization] does not insure by implication or otherwise the United States

> against any judgment or other cost incurred as the result of the defense of such claim, or entitle the United States to contribution or indemnity, unless expressly so provided in such insurance.

IHS has indicated that it cannot agree to this proposed clause without DOJ approval. We understand that IHS and the agency's Office of General Counsel are seeking such concurrence. If approved, this provision would protect the co-signers' insurers to the Compact from exposure to DOJ claims for reimbursement for adverse judgments and costs in FTCA cases when a tribe obtains private insurance which is allegedly duplicative of FTCA. It would not, however, protect other tribes and tribal organizations outside the Alaska Tribal Health Compact which could be affected if this misguided FTCA practice by DOJ recurs.

We respectfully ask that your Committee request that the Department of Justice put an end to this practice. Unless the Department of Justice modifies its position, a clarifying amendment may be needed to assure that tribal contractors are able to rely on FTCA protection with full confidence that the United States will not turn around and sue the private insurance carriers after defending an FTCA case ostensibly on their behalf.

In closing, BBAHC reaffirms that the FTCA provides an effective system of protecting tribal organizations fulfilling federal program obligations within reasonable cost limitations. BBAHC urges that the following steps be taken to assist in maintaining the effectiveness of FTCA protection:

1. That this Committee communicate that the Department of Justice and Indian Health Service should agree to the co-signers' proposed FTCA provision for the FY 2001 AFA to the Alaska Tribal Health Compact noted above. Such communication should serve as a clear policy statement that

the United States is not an implied insured under an ISDEAA contractor's or compactor's private liability insurance policy which is purchased to supplement FTCA protection;

2. That the Department of Health and Human Services and the Department of the Interior, in consultation with the Department of Justice, provide an authoritative definition of the scope of FTCA coverage which can be used to assist ISDEAA contractors and compactors in obtaining adequate supplemental, but not duplicative, insurance coverage from the industry;

3. That Interior and HHS consult with the insurance industry on rating residual risks and pricing of coverage accordingly.

Bristol Bay Area Health Corporation thanks you for your attention to these concerns.

U.S. Department of Justice

United States Attorney
District of Alaska at Anchorage

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February 8, 1999

Via Certified Mail
Return Receipt Requested

Parry Grover, Esq.
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Re: Bristol Bay Area Health Corporation
Demand for Indemnification

Dear Mr. Grover:

We understand that you are counsel for Bristol Bay Area Health Corporation ("BBAHC"). This letter is a demand for indemnification of the United States by BBAHC pursuant to the terms of the parties' contract.

We have discussed this matter with you and your staff in the past on a number of occasions. Briefly, the relevant facts are as follows. On November 27, 1993. Lori Dee Wilson was severely injured when she was accidentally given a glass of commercial dishwashing detergent at a social function sponsored by BBAHC at "Jakes' Place", BBAHC's alcohol abuse transitional care facility co-located with the Kanakanak Hospital complex near Dillingham. Thereafter, Lori Dee and her mother, Marilyn Wilson ("the Wilsons") filed suit against BBAHC. Eventually, the suit against BBAHC was dismissed, and the Wilsons' refiled their claims against the United States in Federal Court pursuant to the Federal Tort Claims Act. As you are aware, the United States was the proper defendant pursuant to the Indian Self Determination and Education Assistance Act, 25 U.S.C. §450.

The Wilsons had very significant damage claims as a result of the negligence of BBAHC and its employees. Lori Dee Wilson's injuries were severe and permanent. Because of this, the United States entered into a settlement agreement with the Wilsons in August, 1997, pursuant to which the United States paid a total of two million eight hundred thousand dollars ($2,800,000.00). In exchange, the Wilsons agreed to release any and all claims against the United States and BBAHC arising from the November, 1993 incident.

At all relevant times, BBAHC was a §638 contractor, providing health care services to Alaska Natives in the Bristol Bay region pursuant to a written contract with the United States Indian Health Service. Among other provisions, the contract between the United States and BBAHC included broad a "Indemnity and Insurance" provision:

> (a) The Contractor shall indemnify and save and keep harmless the Government against any or all loss, cost, damage, claim, expense or liability whatsoever, because of accident or injury to persons or property or others occurring in connection with any program included as a part of this contract, by providing where applicable, the insurance described below:
>
> (b) The contractor shall secure, pay the premium for, and keep in force until the expiration of this contract or any renewal period thereof, insurance as provided below. Such insurance shall specifically include a provision stating the liability assumed by the Contractor under this contract.
>
> * * *
>
> (f) Each policy of insurance shall contain a provision that the insurance carrier waives any rights it may have to raise as a defense the tribe's sovereign immunity from suit, but such waivers shall extend only to claims the amount and nature of which are within the coverage and limits of the policy of insurance. The policy shall contain no provision, either express or implied, that will serve to authorize or empower the insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the insurance policy.

BBAHC maintained in effect several liability insurance policies. These included Continental Insurance Policy No. HMA 9500648-5, which was in effect at the time of the incident involving the Wilsons. This policy carried limits of $1,000,000 each occurrence and $2,000,000 in the aggregate. The United States believed that this policy provided coverage to the United States and BBAHC with respect to this incident, and that it specifically included the indemnity obligation assumed by BBAHC pursuant to the above-quoted contract language. (See, definition of "Insured Contract" in the policy Coverage Form).

In reliance on this policy, the United States tendered defense of the Wilson claims to Continental, BBAHC's insurer.

Continental rejected the tender, categorically denying that the insurance procured by BBAHC extended coverage to the United States.

In light of Continental's denials of the United States' tender, the United States at this time demands indemnification from BBAHC pursuant to the terms of the contract (quoted above) between BBAHC and to United States. BBAHC's liability to the United States for indemnification far exceeds the limits of the Continental policy.

Despite the disparity between BBAHC's indemnity obligation to the United States and the insurance coverage available to BBAHC, the United States is willing to settle its claims against BBAHC in this case upon payment of an amount equal to the policy limits, plus applicable Rule 82 attorneys fees, interest, and any and all sums which Continental is contractually obligated to pay under the policy. Bonha v. Hughes, Thorsness, Gantz, Powell, and Brundin, 828 P.2d 745, 768 (Alaska 1992), Schultz v. Traveler's Indemnity Co., 754 P.2d 265 (Alaska 1988). It is our understanding that BBAHC has no applicable umbrella policy or other insurance coverage available in this case. If this understanding is incorrect, please advise us immediately.

This letter is submitted for the purposes of settlement only. This non-negotiable, one-time offer will expire by its own terms as of 5:00 p.m., Alaska Standard Time 90 days from the date of receipt hereof.

Very truly yours,

ROBERT C. BUNDY
UNITED STATES ATTORNEY

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July 3, 2000

Senator Ben Nighthorse Campbell
Chairman, Committee on Indian Affairs
United States Senate
838 Hart Office Building
Washington, D.C. 20510

Re: Oversight Hearing

Dear Senator Campbell:

Thank you for your invitation to give testimony at the oversight hearing which the Committee on Indian Affairs has scheduled for July 12, 2000 on "the GAO and BIA Reports on Risk Management and Tort Liability."

Unfortunately, I will be out of the Country from July 8 - July 20, 2000, so I will not be able to appear as a witness for that hearing.

However, I do wish to commend the Committee for undertaking this hearing. It is clear that the Department of Justice has adopted a number of policies and legal positions which are clearly contrary to the letter and spirit of the legislation extending FTCA coverage to self-determination contractors operating per 25 U.S.C.§ 450 *et seq.* and to Tribally controlled School Grant Act schools operated per 25 U.S.C. § 2501 *et seq.*

I have identified some of these harmful DOJ policies and positions in prior correspondence to the Interior Department and to GAO. ***See,*** my letter of August 20, 1999, a copy of which is attached (without enclosures).

In our opinion, these DOJ policies and legal positions plainly "stand as an obstacle to the purposes and objections of Congress" in extending FTCA coverage to these tribal entities and would be held preempted by federal law if challenged in Court. ***See, Ramah Navajo School Board, Inc. v. Bureau of Revenue,*** 458 U.S. 832, 845-846 (1982) (state tax on non-Indian builder of

We can prepare a notebook *viz* the status of all pending matters (and containing the most current version of key documents) if you feel that will be helpful.

Again, we look forward to working with you this year.

Sincerely,

C. Bryant Rogers

C. BRYANT ROGERS

CBR/jt
Enclosures: As indicated

cc: Morris Bullock, Chairman

s:\Rogers\Coushatta\Correspo\Bergen 070300.wpd

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August 20, 1999

VIA FACSIMILE (202) 208-5113 AND
BY FEDERAL EXPRESS

Mr. Jim James
Tribal Relations Specialist
Department of the Interior
Bureau of Indian Affairs
Office of Tribal Services
1849 C Street NW -
MS-4660-MIB
Washington, D.C. 20240

Re: FTCA Issues

Dear Jim:

This letter is in follow-up to our ongoing work on the BIA FTCA Advisory Work Group created to aid the Assistant Secretary Gover to complete the FTCA/insurance report required by § 704 of Title VII of the FY 1999 omnibus and emergency supplemental Interior Appropriations Act, HR 4328. Title VII is titled "Indian Tribal Tort Claims and Risk Management Act of 1998." As you know, a number of critical policy issues have arisen in connection with the legislation extending FTCA coverage to Public Law 93-638 contractors and tribal grant schools. See, Public Law 101-512, as amended by Public Law 103-138; 25 U.S.C. § 450f(d) (as to certain IHS contractors).

In this regard, I want to call to your attention several especially harmful (and in our opinion unlawful) interpretative policies respecting FTCA adopted by the U. S. Department of Justice ("DOJ") which are seriously undermining the intent of Congress as regards the tort claims protection afforded the tribes and Public Law 93-638 contractors and grant schools pursuant to these statutes. The same FTCA laws and policies apply to Self-Governance Tribes under Title III and Title IV of Public Law 93-638. All references in this letter to '638 contractors should also be understood to be references to the Self-Governance Tribes. Based on the best information I have been able to

obtain, these policies were formulated by Jeffrey Axelrad, Director, Torts Branch, DOJ, and by Jim Irnoson, Esq. of that Branch. However, they may have been endorsed by higher-ups in DOJ.

1. DOJ POLICY OF NOT EXTENDING FTCA COVERAGE TO INDIVIDUAL TRIBAL COUNCIL MEMBERS AND TO SENIOR TRIBAL ADMINISTRATIVE PERSONNEL

The clear intent of Congress was to extend the full umbrella of FTCA coverage to '638 contractors and grant schools and all persons involved in carrying out those '638 or grant school programs. DOJ has acknowledged that this was Congress' intent in its policy memorandum of October 16, 1998, from Jeffrey Axelrad - Subject: Indian FTCA Issues Arising from Extension of the Indian Self-Determination Act. (Copy enclosed.) See, in particular, pp. 7-10 of the 10-16-98 DOJ memo.

The laws extending FTCA coverage to '638 contractors and grant schools do not differentiate between a school or other program janitor and a school board member or tribal council member or senior tribal/school-administrator. If either is sued in connection with activities undertaken in furtherance of or while engaged in carrying out the operation of the '638 contract or the school grant, they should be covered and protected by the FTCA, to the same extent as would an ordinary federal employee.

Instead, DOJ has adopted a policy of not covering council members or senior tribal administrative personnel under the FTCA, even if they are sued for actions or inactions undertaken in connection with operation of a '638 contract program. This issue first came to my attention in connection with Walker v. Spears, et al., Case No. 9681, Dist. Ct., Thurston County, Nebraska and No. 8: 99CV11, U.S. Dist. Ct., District of Nebraska (copy of Amended State Court Complaint and March and June, 1999 Federal Court Orders and related documents enclosed) involving the Omaha Tribe of Nebraska. I learned of this case indirectly through an Associate Interior Solicitor who referred to the DOJ policy it embodied, that reference led me (through Jeffrey Axelrad, Esq.) to Vanessa Boyd, Esq., the DOJ attorney who handled the most recent phases of DOJ's role in the case. I subsequently confirmed the essential facts and obtained key documents from Maurice Johnson, Esq., Monteau, Peebles & Marks, L.L.P., 12100 W. Center Road, Suite 202, Bel Air Plaza, Omaha, Nebraska 68144-3960, an attorney who represented the Omaha Tribal defendants in early phases of the case.

In Walker, a woman sued local BIA police and other BIA officials, tribal jail personnel, the Tribe's Chief of Tribal Operations, and individual tribal council members in connection with the tribe's operation of a BIA jail pursuant to a '638 contract. The plaintiff claimed that the defendants had been negligent in not timely providing or ensuring the timely provision of proper medical care at the jail resulting in a miscarriage. The lawsuit was filed as an ordinary tort claim in state court. Nebraska is a partial Public Law 83-280 State. In that September 14, 1998 and its subsequent letter of September 23, 1998, the Interior Solicitor confirmed to DOJ that the actions/inactions for which Mr. Parker and the tribal council members had been sued in tort had occurred within the course and scope of their employment in carrying out the '638 contract jail operations.

In response, the local U. S. attorney entered an appearance and removed the case to federal court on behalf of the federal (BIA) personnel and for the tribal jail personnel, but not for the tribal council members or for James Parker, the Tribe's Chief, Tribal Operations.[1] See, enclosed DOJ Memo of January 1, 1999, and the Federal Magistrate's Order approving substitution of the United States as sole defendant, entered March 4, 1999. This left Mr. Parker and the individual tribal council members (and the tribal prosecutor, See, Footnote 1) to fend for themselves in state court without FTCA protection. The individual tribal council members are identified by name in the enclosed Interior Solicitor's letter of September 14, 1998.

After the United States was substituted as the sole defendant for the BIA and the tribal jail personnel, DOJ secured a further Order dismissing all the tort claims against those covered employees on the grounds plaintiff had failed to exhaust her administrative remedies under the FTCA. That Order was entered May 5, 1999. The Federal Court then dismissed the case for lack of subject matter jurisdiction and remanded the case to state court as to the remaining tribal defendants. That case is now pending against James Parker and the tribal council members and the Tribe's contract prosecutor (Lota Matharani, Esq.) in state court. See, enclosed Order of June 15, 1999. The other tribal defendants were more directly involved in day-to-day jail operations. The only reasons the council members, the Chief, Tribal

[1] DOJ also refused to recognize FTCA coverage for Lota Matharani, Esq., the Tribal prosecutor. The question whether she should be extended FTCA coverage in this matter presents some policy issues beyond the scope of this letter. See, Bird v. U.S., 949 F.2d 1079 (10th Cir 1991). I note, however, that the Interior Field Solicitor, Minneapolis Office, did ultimately conclude that Ms. Matharani should also be recognized as a covered employee under the FTCA in connection with this case. See, Interior Solicitor's letter of September 23, 1998.

Operations, and the prosecutor were sued were because of their decision to contract for operation of the jail, and/or for making budgetary and personnel/training decisions which were alleged to have given rise to jail operations not in accord with BIA standards applicable to the provision of medical care in jails. See, enclosed Amended Complaint.

When I questioned why the Justice Department did not appear and represent the tribal council members, the explanation provided by the DOJ attorney who handled the case was that the council members' activities were too "remote" from the day-to-day jail operations to constitute involvement in the "carrying out" of the program within the meaning of Public Law 101-512.

In reply, I explained that the council members' involvement in policy decisions affecting the jail, e.g., whether to contract for its operation under Public Law 93-638 and what jail budget amounts to accept or expend, and how jail operators oversight functions were to be handled were all actions intrinsically involved in "carrying out" the program. I further explained that this had been recognized by the Interior Department in the case of council members as to whom a portion of tribal council salaries are routinely recognized to be allowable indirect costs necessarily incurred to pay for council activities and decisions made or undertaken in connection with the operation of '638 contract programs. I further explained that indirect cost funded functions were an integral part of overall '638 contract operations and have been recognized as such by the courts and by statute. See, 25 U.S.C. §450 j-1 (a)(2); See, generally, Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997); Alamo Navajo School Board, Inc. and Miccosukee, IBCA 3463-3466, IBCA 3560-3562, Interior Board of Contract Appeals, December 4, 1997. Comparable costs for grant schools are funded as administrative cost grants under 25 U.S.C. § 2008. See, generally, the National Congress of American Indians National Policy Work Group on Contract Support Costs Final Report (June 1999); and, the General Accounting Office Report to Congressional Committees on: Indian Self-Determination Act - Shortfalls in Indian Contract Support Costs Need to Be Addressed (June 1999). At the time of the above discussions I was not aware that DOJ had also refused to treat James Parker, Chief, Tribal Operations as a covered FTCA employee. His position was also funded through the Tribe's Interior OIG approved indirect cost pool and, as noted above, Interior did inform DOJ that Mr. Parker's activities giving rise to the suit were within the course and scope of his employment in carrying out the '638 jail contract. See, Interior Solicitor's letter of September 23, 1999. Obviously, DOJ's failure to cover him is even less defensible.

This DOJ policy is clearly contrary to the intent of Congress and the clear import of the case law interpreting the law as regards indirect costs (contract support costs). Not only does this policy unfairly subject Senior Tribal Administrators and tribal council members to the cost, risk and liability associated with such tort claims, it also forces the tribes (or individual council members and employees) to raise sovereign immunity or legislative immunity and other defenses and incur legal costs in doing so to respond to such claims. It also undercuts the Congressional purpose of enabling tribes to secure reduced premiums in connection with supplemental insurance for their '638 program (or school grant) operations because the net effect of this DOJ policy is to leave a larger range of claims uncovered by the FTCA, thus necessitating expenditure of additional tribal or federal funds to purchase more supplemental liability policies than would otherwise be required, the very evil which Congress intended to eliminate. See, H. Rep. No. 100-393, 100th Cong. 1st Sess. at p. 4 (1987); S. Rep. No. 100-274, 100th Cong., 1st Sess. at p. 26 (1987):

> As originally enacted, the Self-Determination Act authorized either Secretary to require that tribal contractors to obtain liability insurance. The Act also precluded insurance carriers from asserting the tribe's sovereign immunity from suit.
>
> In practice, the costs of such liability insurance have been taken from the amount of funds provided to the tribal contractor for direct program costs or for indirect costs. The Committee is concerned that tribal contractors have been forced to pay for liability insurance out of program funds, which in turn, has resulted in decreased levels of services for Indian beneficiaries.
>
> It is clear that tribal contractors are carrying out federal responsibilities. The nature of the legal liability associated with such responsibilities does not change because a tribal government is performing a Federal function. The unique nature of the legal trust relationship between the Federal Government provided liability insurance coverage in the same manner as such coverage is provided when the Federal Government performs the function. Consequently, section 201 (c) of the Committee amendment provides that, for purposes of the Federal Tort Claims Act, employees of Indian tribes carrying out

self-determination contracts are considered to be employees of the Federal Government.

The net effect of the above is to create a disincentive to contracting under '638 and to subject senior tribal administrator and tribal council members to a lesser order of protection under the FTCA than enjoyed by their federal counterparts. This disincentive is contrary to law, as it interferes with and "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" in enacting Public Law 93.638. Hines v. Davidowitz, 312 U.S. 52, 67 (1941), quoted in Ramah Navajo School Board, Inc. v. Bureau of Rev. of N.M., 102 S.Ct. 3394, 3402-3403 (1982) (imposition of state gross receipts tax on non-Indian contractor constructing Indian school for tribal organization pursuant to Public Law 93-638 was pre-empted by federal law because the state tax interfered with the tribal school's ability to achieve the Congressional objectives under Public Law 93-638).

Does anyone doubt that if some federal employee paid to perform the equivalent of indirect cost functions were sued for making the same kind of budgetary contracting or personnel/training decisions made by a tribal council that they would be covered? Imagine an OMB analyst, a Treasury Department analyst, an OIG auditor, or a senior government administrator, etc., sued for negligently failing to properly identify cost irregularities or for approving or requesting insufficient appropriations to properly operate a federal jail, or to otherwise negligently hire or fail to properly supervise or train jail employees. Obviously they would be covered by the FTCA and most likely by the "discretionary function" defense and neither they nor their agencies would have to personally bear the cost of that defense or secure insurance to cover it.

DOJ's explanation for this policy position is that waivers of sovereign immunity against the federal government are to be strictly construed and that Congress did not intend to cover tribal council members under the FTCA even when activities for which they are sued in tort directly relate to a '638 contract because those activities are too "remote" from day-to-day operations to constitute "carrying out" the program. This is not a position DOJ would take in connection with ordinary federal employees. To the extent that there is any ambiguity in the statute (we submit there is none on this issue and that tribal Council members and senior tribal administrators in such circumstances are clearly covered), that ambiguity must be construed in favor of the tribes and not in favor of the federal government. Bryan v.

Itasca County, 426 U.S. 373, (1976); Ramah Navajo Chapter v. Lujan, supra.

The issue outlined above is of critical long term importance to the efficacy of the FTCA coverage extended by Congress for '638 contractors and school grantees, and I urge that the BIA's final report to Congress on FTCA/Insurance issues address this problem and recommend remedial legislation if necessary to force DOJ to conform its policy to the law.

Please note that DOJ has not yet formally determined whether to apply this same policy to school board members or hospital board members for tribal organizations operating '638 contracts or grant schools, but at least one Interior Field Solicitor has informed me that the same DOJ policy does apply to such board members.

In our view, since the tribal organizations in such circumstances are clearly covered under FTCA by Public Law 101-512, the board members in such circumstances when sued for actions or inactions taken as board members in regard to '638 or school grant programs should be given the same level of protection, else the whole point of the statute will be defeated. The same argument applies as to tribal councils.

Also, I have not been able to locate any writing from DOJ confirming the above-described policy even as regards tribal council members or senior tribal administrators, but was told by two different DOJ attorneys, Jeffrey Axelrad, Chief Torts Branch, and Vanessa Boyd, Esq., DOJ Tribal Attorney, (and the referenced Associate Interior Field Solicitor) that this was in fact the present DOJ policy on this issue; and, DOJ's conduct in the Walker case clearly reflects that policy. Surprisingly there is not a hint of the policy in the DOJ FTCA memo of 10-16-98.

2. DOJ POLICY OF NOT APPEARING IN TRIBAL COURTS AND PRACTISE OF NOT SEEKING FEDERAL COURT RELIEF TO STOP ON-GOING TRIBAL COURT TORT CASES COVERED BY FTCA

The second matter which I wish to call to your attention has to do with the difficulties created by another Justice Department policy pursuant to which it does not permit U. S. Attorneys or other Justice Department Attorneys to appear in tribal courts for any reason at any time. This short-sighted policy

is not only an insult to the tribes and an affront to tribal sovereignty, but has also created real difficulty in regard to the FTCA coverage for '638 contractors and school grantees. As illustrated in the Walker case (where at least those tribal employees recognized by the DOJ to be covered by the FTCA were protected from the state court lawsuit) where ordinary federal employees are sued in state court, it is standard DOJ policy under the FTCA for the government to appear and remove the case from state court to federal court based on an accelerated review process for determining that the employees are covered under the FTCA. This protects the employees from the cost, risk and emotional turmoil of being sued in state court.

When the same thing happens to a covered employee in tribal court, there is no direct removal statute applicable. See, 28 U.S.C. §§ 1441-1442; cf. El Paso Natural Gas Company vs. Neztsosie, 119 S.Ct. 1430, 1437 (1999).

Thus, neither DOJ nor a tribal or school employee engaged in '638 or school grant activities who is sued for tortious activity alleged to have occurred in connection with the operation of a '638 program or school grant program can automatically remove the case to federal court. Because of DOJ's other policy of refusing to appear in tribal courts, DOJ will not appear in tribal court to move to dismiss the case or to request the tribal court to desist in pursuing the case to argue that these employees are covered under the FTCA, and that an FTCA claim filed in the U.S. District Court (after administrative exhaustion) is the exclusive remedy for such torts. We are advised that the Navajo courts have taken the position that until and unless the U.S. Attorney or a federal court has actually certified an employee, to be covered under the FTCA, e.g., that the actions were within the course and scope of covered employment, the Navajo courts retain jurisdiction over those tort claims, even when the Court finds that the tort in question occurred within the course and scope of covered employment under the FTCA. See, the Navajo District Court ruling in Mariano v. Wright, No. CP-CV-377-98, Dist. Ct. of the Navajo Nation, Crown Point District (orders of 9/4/98 and 1/27/99, copies enclosed) in which the Court held that where an alleged tort was committed (in this case by Bill Wright, a former BIA employee during the course and scope of his BIA employment) but is not one of those torts upon which relief may be granted under the FTCA due to the exceptions at 28 U.S.C. § 2680(h), that the Navajo Courts do have jurisdiction to hear the tort claim. This ruling cannot be squared with United States v. Smith, 499 U.S. 160 (1991). (FTCA is exclusive remedy for torts committed by federal employees while on duty, even if FTCA permits no

remedy.) See, Footnote 1 infra. In any event, such cases are going forward in the tribal court system, at least at Navajo.

Further complicating the matter is that some attorneys have realized that if they file tribal court cases against covered '638 or grant school employees, they can obtain extensive discovery through Navajo court orders building up an information base which can then be used to formulate more effective FTCA claims against the federal government involving the same incidents. See, Footnote 2 infra. Some Interior solicitors are livid about this process, but it is a direct result of the DOJ policy of not appearing in tribal court to secure dismissal of these actions. This policy leaves tribal schools with the option of facing contempt of court orders in tribal court *viz.*, discovery or incurring their own legal costs to, for instance, seek a federal court injunction of the tribal court proceedings, but in a disadvantageous situation in advance of any Interior determination or DOJ certification that the employee is covered by the FTCA. As a practical matter, the plaintiff would in such circumstances be forced to join the United States as a defendant along with the tribal judge, to obtain the desired relief, giving rise to significant jurisdictional and immunity issues.

The net result of these inter-related problems is again to continue subjecting tribal entities operating '638 contract programs or grant schools and their employees to tort lawsuits in tribal court to which federal employees would never be subjected. We are confident that if (at least in ordinary circumstances) a federal BIA employee were subjected to a tort suit in tribal court for actions taken in connection with his employment that DOJ would immediately go in to the federal district court and certify that the employee is covered and seek to enjoin the tribal court proceeding. '638 contractors, employees and school grant employees are entitled to the same level of FTCA protection. In fact, Justice's policy memo of 10-16-98 recognizes that this situation may arise and states the following policy position at pages 6, 18-19:

> Tribal courts are not district courts pursuant to 28 U.S.C. § 134(b) and, therefore, lack jurisdiction to hear any portion of a claim cognizable under the FTCA, including jurisdictional challenges. (p.6)
>
> * * * * *
>
> Tribal courts have no jurisdiction over torts cognizable under the FTCA; exclusive jurisdiction lies in Federal District Courts. Our practice should be to first seek dismissal from the tribal court (usually by letter,

> rather than a pleading or other document that might be construed as an appearance) for lack of jurisdiction over any tort claim instituted against the United States or any employee of the United States acting within the scope of employment.
>
> It would be in order to point out the appropriate steps to follow and suggest that if the plaintiff filed the case in tribal court within two years after the claim accrued, the plaintiff would not be precluded from presenting an administrative claim with the appropriate agency. If necessary, the action can later be filed in its proper forum, federal district court.
>
> However, should the tribal court fail to dismiss the action, we should be prepared to either move to enjoin the tribal court from taking any action, seek declaratory relief, or move for summary judgment and/or dismissal in the Federal District Court. (pp. 18, 19)

Notwithstanding this formal policy position, DOJ has not typically sought to enjoin tribal court proceedings in such circumstances. This presents serious equal protection problems because Congress clearly intended such tribal employees, *viz.,* '638 or grant school programs to have the same FTCA coverage as regular BIA or other federal employees and DOJ's conduct flatly prevents that equal treatment.

In response to questions raised about this approach, DOJ has indicated that its refusal to go into federal court to enjoin tribal court proceedings in such circumstances reflects its respect for tribal sovereignty. Yet, Tribal Courts have no sovereignty to exercise as regards adjudication of tort claims against persons the Congress has deemed to be federal employees covered by FTCA,[2] for actions taken during the course and scope of covered employment. Louis v. United States, 967 F.Supp. 456, 458-459 (D. N.M. 1997). This DOJ argument is, instead, flatly at odds with DOJ's policy memo and the clear intent of Congress. DOJ does not hesitate to take the same action to take cases out of state court, *e.g.,* the Walker case. If that is not considered an insult to state sovereignty sufficient to bar the removal of

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[2] However, tribal law may provide the substantive rule of decision in FTCA claims arising on Indian reservations, See, Cheromiah v. United States, CV 97-1418 MV/RLP (June 29, 1999); but, the FTCA makes a U.S. District Court lawsuit the only possible judicial remedy for torts alleged to have been committed by a covered employee during the course and scope of his employment, even if that leaves the claimant with no remedy. e.g., as a result of the FTCA exclusions at 28 U.S.C. § 2680(h). United States vs. Smith, 499 U.S. 160 (1991). The Navajo Court ruling to the contrary in Wright cannot be squared with the FTCA.

such cases to federal court, why should tribal sovereignty be given a greater protection than state sovereignty in implementation of the important uniform federal statutory scheme reflected in the FTCA?

Moreover, extension of FTCA coverage to '638 contractors and school grantees was intended to relieve these tribal entities of the legal costs that would otherwise be incurred in defending tort claims arising from their operation of '638 or school grant programs, and for the insurance costs that would otherwise be incurred to cover those claims. It was clearly the intent of Congress that this would be a benefit to the tribes as a practical matter as well as saving them and/or the federal government substantial liability insurance costs. The DOJ policy directly undercuts both these objectives and cannot any way be justified as a "protection" to tribal sovereignty.

3. OTHER PROBLEMATIC DOJ INTERPRETATIVE POLICY REGARDING FTCA AND PUBLIC LAW 93-638

We have previously discussed the harms to Public Law 93-638 contractors and school grantees of two (2) other DOJ policies respecting application of the FTCA to those entities and (their employees) and the DOJ duty to treat them as covered employees under the FTCA for all their actions or inactions occurring within the scope of their employment.

The first is the DOJ policy of tendering the federal defense of (and payment of judgments awarded in) FTCA cases against '638 contractors or school grantees to those entities' insurance carriers to the extent of any (even inadvertent) duplicative insurance coverage whether that insurance is paid for with tribal or federal funds, subject to policy limits. The irony here is that it is DOJ policies, and the uncertainty they have engendered on what '638 and grant school employees and what tort claims are or are not covered under the FTCA, which are the primary reason that such duplicative coverage still exists --- ten years since the extension of FTCA coverage to all '638 and grant school activities.

The Second is the DOJ and (sometimes) Interior policy of seeking (or threatening to seek) contribution or indemnification from '638 contractors or school grantees where the government does not like something the covered entity has done in regard to or which may have helped give rise to the FTCA claim;[3] or, pursuant to old boilerplate contract clauses which are inconsistent

[3]For example, an Associate Interior Solicitor has recently threatened to assert an indemnification claim against a school grantee where that school grantee provided school

with current law, hence void and unenforceable under Mapco Alaska Petroleum, Inc. vs. U.S., 27 Cl. Ct. 405, 416 (1992), aff'd in part, at 30 Fed. Cl. 153 (1993) (federal contract clauses contrary to law are void). This occurred in an FTCA case involving a '638 contractor regarding an IHS clinic.

These DOJ policies and practices are in our opinion also inconsistent with the government's obligations under the FTCA and need to be changed to bring the government practice into conformity with the law. Also, neither of these policies is reflected in DOJ's 10-16-98 FTCA memo.

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documents to a plaintiff in response to a tribal court subpoena in a tribal court tort proceeding which should have been held pre-empted by the FTCA, under United States v. Smith, Supra, but where the tribal court had rejected that argument. See, Navajo Curt Order of January 27, 1999, enclosed. The BIA should have requested that DOJ seek to have this tribal court case enjoined, but did not. The plaintiff then used those records to formulate and file an FTCA claim against the United States in a separate proceeding. That FTCA claim sought damages for emotional distress alleged to have been suffered by the students for the alleged sexual abuse and from their participation in the school grantee's administrative hearing to determine whether the students' complaints warranted discipline or dismissal of the former BIA teacher who was then an employee of the school grantee. A copy of that FTCA claim is enclosed. These events occurred in the Wright case. The same Associate Interior Solicitor also threatened *viz.* the same case to have the school personnel who honored the tribal court subpoena prosecuted for violation of 5 U.S.C. § 552a(i)(1) (a statute which requires a knowing and willful violation of the Federal Privacy Act, an Act that also contains an express exception for records produced in response to judicial subpoenas issued by courts of competent jurisdiction, 5 U.S.C., § 552a(b)(11)). The employee complied with the subpoena after conferring with the appropriate BIA officials who took no action and counseled her to honor the subpoena. The records in question related to alleged tortious conduct by Mr. Wright *viz.* certain minor students occurring at a time when he was an ordinary federal employee, before the school converted to grant status. There is no way that this employee's conduct can be shown beyond a reasonable doubt to constitute a "knowing" violation of the Privacy Act. Indeed, that Act is probably not even applicable to school grantees. It clearly is not applicable to Public Law 93-638 school contractors. See, 25 U.S.C. § 450l(b). The Associate Interior Solicitor then intimated that the school's provision of the referenced documents to plaintiff's counsel might invoke DOJ " prosecutorial discretion" to decline to recognize the school and its staff as covered "employees" under the FTCA, a discretion DOJ does not have under the FTCA. Instead, DOJ has a clearly legal duty under 28 U.S.C. § 2671, *et seq.* To acknowledge and assert the FTCA protections for all covered employees sued in tort for actions or inactions during the course and scope of their employment. This duty is not discretionary and cannot lawfully be withheld from a '638 contractor or school grantee otherwise eligible for FTCA coverage for any reason, much less in retaliation for events which DOJ or BIA wish had not occurred. Such threats are legally unfounded and otherwise contrary to the government-to-government relationship which underlies the Self-Determination policy and will be separately addressed before the Interior Department in due course.

I strongly urge that the policy issues raised in this letter be addressed in Assistant Secretary Gover's report to Congress. As discussed, I am also sharing this letter with the General Accounting Office, which has instituted its own look at FTCA coverage issues respecting '638 contractors and school grantees, and to other interested attorneys and tribal organizations.

Sincerely,

C. BRYANT ROGERS

CBR/jt
Enclosures: as indicated
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United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

APR 11 [illegible]

Honorable Ben Nighthorse Campbell
Chairman, Committee on Indian Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Title VII of the FY 1999 Interior Appropriations Act, P. L. 105-277, is entitled the *Indian Tort Claims and Risk Management Act* (Act). The Act required the Secretary to survey Indian tribes on the degree, type, and adequacy of liability insurance coverage and to submit a report to Congress on liability insurance coverage, including an analysis of loss data, risk assessments, and projected exposure to liability.

The Bureau of Indian Affairs (BIA), in consultation with Indian leaders and insurance industry representatives, prepared a survey and sent it to all Indian tribes. The BIA was unable to meet the statutory requirements to conduct tribe-by-tribe risk assessments and to estimate each tribe's potential exposure to liability claims. An undertaking of that magnitude would be enormously costly and would require employing the services of insurance professionals.

The enclosed report contains information on the tribal responses to the survey, identifies administrative actions the BIA will take to better inform Indian tribes of the scope of the coverage provided by the Federal Tort Claims Act (FTCA), and notes unique legal issues that have arisen since Congress extended FTCA coverage to Indian tribes operating Self-Determination contracts of Self-Governance compacts.

A similar letter has been sent to the Honorable Ralph Regula, Chairman, Subcommittee on Interior and Related Agencies, Committee on Appropriations, U.S. House of Representatives, Washington, DC 20515.

Sincerely,

John Berry
Assistant Secretary
Policy, Management and Budget

Enclosure

cc: Honorable Slade Gorton
Chairman, Subcommittee on Interior
and Related Agencies
Committee on Appropriations

Honorable Daniel K. Inouye
Vice Chairman, Committee on Indian Affairs

Honorable Robert C. Byrd
Ranking Minority Leader
Subcommittee on Interior
and Related Agencies
Committee on Appropriations

SURVEY OF LIABILITY INSURANCE COVERAGE

BUREAU OF INDIAN AFFAIRS

July 2000

-i-

Executive Summary

The *Indian Tort Claims and Risk Management Act of 1998*, (Act) was enacted as Title VII of the *Department of the Interior and Related Agencies Appropriations Act, 1999*. The law directed the Bureau of Indian Affairs (BIA) to conduct a comprehensive survey of the degree, type and adequacy of liability insurance of Indian Tribes. The Act also required that BIA report the survey results to Congress. The BIA was not able to meet all of the statutory reporting requirements, for the following reasons:

- Tribal response to the survey was voluntary. Approximately 25 percent of tribes completed portions of the survey;
- Most tribes did not submit information on claims; and
- The BIA does not have insurance professionals who could conduct tribe-by-tribe risk assessments and estimate potential exposure to liability.

Insurance Claims Compared to Coverage under the Federal Tort Claims Act (FTCA)

Sixty-one tribes provided a three-year history of insurance claims. These tribes reported that more than 19,000 claims had been filed. In a recent report, the General Accounting Office identified only 228 FTCA claims submitted for all tribally-operated BIA programs during a three-year period. Tribes operating gaming enterprises had significantly more insurance claims than non-gaming tribes. More than half of the claims, however, were for Workers' Compensation. Tribes can recover the cost of Workers' Compensation insurance attributable to Federal program operations through indirect cost rates.

Better Information is Needed on FTCA Coverage and Exclusions

Studies have found that neither tribes nor insurance carriers have enough information on FTCA coverage to make informed decisions that might lead to a reduction in rates for liability insurance. BIA will issue informational material and identify DOI employees who can provide authoritative answers to FTCA questions.

Recommendations

A previous insurance study recommended that an on-line claims registry be used to improve consistency in interpreting FTCA and to help tribes and insurers determine whether a particular claim is likely to be covered by FTCA. If Congress agrees that such a registry should be developed, legislation would be needed to place the authority and responsibility with one of three Departments involved with processing FTCA claims against Self-Determination contractors: the Department of Justice, the Department of Health and Human Services, or the Department of the Interior.

Unique legal issues have emerged since FTCA coverage was extended to tribal contractors.

Clarification of these issues through legislation would provide greater certainty to both tribal contractors and individuals who file an FTCA claim.
The BIA also recommends that the statutory requirement to report annually to Congress on liability insurance coverage be repealed.

INTRODUCTION

The *Federal Tort Claims Act* (FTCA) provides a limited waiver of the United States' sovereign immunity and establishes administrative and judicial processes through which individuals may seek compensation from the Federal Government for injuries sustained as a result of certain acts or omissions of Federal employees (Title 28 U.S.C. § 2671 *et seq.*)

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury of loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred. *[28 U.S.C. § 2679(b).]*

Once administrative remedies have been exhausted, Federal courts have exclusive jurisdiction to hear FTCA claims.

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the Untied States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. [28 U.S.C. § 1346(b)]

For the last decade, the FTCA remedies have been available to individuals injured as a result of acts or omissions of tribal employees carrying out functions under a Self-Determination contract, grant or compact.

In its original version, the *Indian Self-Determination and Education Assistance Act* authorized the Secretaries of the Interior (DOI) and Health and Human Services (HHS) to require that Indian tribes obtain adequate liability insurance as a prerequisite to Self-Determination contracting.[1] The sharp escalation in the cost of all insurance, including medical malpractice insurance, in the mid-1980's and the knowledge that some tribes had to divert program funds to purchase the required insurance, led Congress to begin consideration of other options. Between 1987 and 1994, a number of provisions were enacted to extend the coverage of the *Federal Tort Claims Act* (FTCA) to Indian tribes and tribal organizations operating programs under the authorities of the *Indian Self-Determination Act*, as amended.[2]

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[1] Title 25, U.S.C. § 450f(c) Procurement of liability insurance by tribe as prerequisite to exercise of contracting authority by Secretary; required policy provisions. (88 Stat. 2206)

[2] For a more complete discussion of the legislative history of FTCA coverage, see the General Accounting Office Report, ***Federal Tort Claims Act: Issues Affecting Coverage for Tribal Self-Determination Contracts***, (GAO/RCED-00-169).

FTCA coverage is extended only to tribal programs operated through the authority of Self-Determination awards. It does not cover program operations funded by any Federal agency other than DOI and HHS, nor does it extend to businesses or programs operated by Indian tribes with tribal funds or other Federal funds.

PRIOR STUDIES

Both the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) funded earlier studies of issues surrounding tribal liability insurance. In 1991, BIA contracted with Foxx & Company to conduct a study of liability insurance coverage. The objectives of this study were to:

- Develop a central database of liability exposure and losses unique to Indian contractors and grantees;
- Evaluate the cost effectiveness of the present methods of providing liability insurance;
- Evaluate the cost effectiveness of providing liability coverage for tribal contract/grant activities on a risk-management, self-insured basis;
- Evaluate the cost effectiveness for continuing coverage under Federal Tort Claims Act, including a statement of cost differences between FTCA and private insurance and self-insurance;
- Conduct an actuarial study based on the actual loss history of grantees/contractors;
- Perform a cost/benefit and policy analysis of pooling and loss prevention compared with the purchase of traditional liability insurance; and
- Prepare a five-year funding plan for providing liability insurance.

In 1997, IHS contracted with the Center for Health Policy Research at The George Washington University Medical Center to conduct an assessment of tribal access to private liability insurance. The primary purposes of the study were to:

- Examine access to private liability insurance by tribes and tribal organizations operating programs under the Indian Self-Determination and Education Assistance Act, and to assess the coordination of that insurance with tribal liability coverage provided under the FTCA;
- Identify barriers to the appropriate pricing of private liability insurance; and
- Recommend strategies that will assist tribes in assessing their need for private liability insurance and assist in obtaining such insurance at reasonable prices.

The contractor for the BIA study was unable to deliver most of the data requested and only 12 tribes provided detailed information for the IHS study. Executive summaries from the two resultant reports are included as Appendix I and Appendix II, respectively.

REPORTING REQUIREMENT

The *Indian Tribal Tort Claims and Risk Management Act of 1998* (Act) was enacted as Title VII of the *Department of the Interior and Related Agencies Appropriations Act, 1999*. This report is submitted pursuant to the provisions of section 704 of the Act:

> SEC. 704. STUDY AND REPORT TO CONGRESS.
>
> (a) IN GENERAL –
>
> (14) STUDY. – In order to minimize and, if possible, eliminate redundant or duplicative liability insurance coverage and to ensure that the provision of insurance to Indian tribes is cost-effective, the Secretary shall conduct a comprehensive survey of the degree, type, and adequacy of liability insurance coverage of Indian tribes at the time of the study.
>
> (15) CONTENTS OF STUDY. – The study conducted under this subsection shall include –
>
> (A) an analysis of loss data;
> (B) risk assessments;
> (C) projected exposure to liability, and related matters, and
> (D) the category of risk coverage involved, which may include –
>
> (i) general liability,
> (ii) automobile liability,
> (iii) the liability of officials of the Indian tribe,
> (iv) law enforcement liability,
> (v) workers' compensation; and
> (vi) other types of liability contingencies.
>
> • ASSESSMENT OF COVERAGE BY CATEGORIES OF RISK. – For each Indian tribe, for each category of risk identified under paragraph (2), the Secretary, in conducting the study shall determine whether insurance coverage or coverage under chapter 171 of title 28, United States Code, applies to that Indian tribe for that activity.
>
> (b) REPORT. – Not later than June 1, 1999, and annually thereafter, the Secretary shall submit a report to Congress that contains legislative recommendations that the Secretary determines to –
>
> 1. be appropriate to improve the provision of insurance coverage to Indian tribes; or
> 2. otherwise achieve the purpose of providing relief to persons who are injured as a result of an official action of a tribal government.

ADVISORY GROUP

To address the reporting requirement, the BIA convened an *ad hoc* working group that included tribal leaders, attorneys who represent Indian tribes, insurance industry representatives, consultants who specialize in Indian policy matters, and Federal employees. A list of the participants is provided in Appendix III. The advisory group held three formal meetings that resulted in the development of a survey instrument (Appendix IV) that was sent to all Indian tribes.

LIMITATIONS OF THIS REPORT

The Act specified a number of study requirements that the BIA was unable to meet:

- **Information on all Indian Tribes**

The survey was to cover "each Indian tribe." While the BIA sent the survey to all tribes, most tribes chose not to respond. BIA received responses from about one-quarter of the Federally-recognized tribal governments. The overall response rate is skewed due to the large number of small tribes in Alaska and California. Only 17 percent of Alaska tribes and 39 percent of California tribes responded. Responses were received from almost 60 percent of the rest of the tribes, however, the majority of those who did respond completed only portions of the survey. Tribes were under no legal obligation to complete the survey and a number of tribes are hesitant to divulge proprietary information.

- **Risk Assessments and Projected Exposure to Liability**

The BIA has no capacity to conduct risk assessments for all tribal activities. Insurance professionals would have to work with each tribe to review all operations, facilities, staff qualifications, training and safety programs, and other factors to determine the risks and potential exposure of each tribe. It should be noted, however, that the 1991 ***Liability Insurance Study*** found that Indian organizations had no unique liability exposure. Further, because Indian tribes are afforded sovereign immunity, those without insurance coverage essentially have no exposure to liability unless they agree to waive the defense of sovereign immunity.

- **Assessment of Coverage by Categories of Risk**

The Act states that for each Indian tribe and for each category of risk, the BIA is to determine whether insurance coverage or FTCA coverage applies "for that activity." Workers' Compensation claims are not covered by FTCA, nor, in some circumstances, are claims against tribal law enforcement officers for intentional torts. The answer with respect to the other categories such as automobile and general liability, is: "It depends."

For example, if driver of a tribal vehicle causes an accident, the injured party could file a claim under FTCA if the automobile was in use **at the time of the accident** for an activity related to a self-determination contract. If the vehicle was in use for general tribal operations or for a purpose unrelated to a self-determination contract, the claim would not be covered under FTCA and would be referred to the insurance carrier. Similarly, tribal employees may work on different projects, some of which are funded by self-determination awards, some of which are funded by other Federal grants that are not covered by FTCA, and some that are tribal operations. Thus, it is not possible to determine, in advance, whether FTCA will provide coverage. It depends on what an employee is doing at the time a third party is injured.

OVERVIEW OF PRIVATE INSURANCE COVERAGE

Tribal response to the survey instrument was voluntary. The BIA received responses directly from 144 tribes. Few tribes, however, completed the entire survey instrument. Insurance carriers provided information on coverage, but not on claims, for 65 other tribes. The following chart provides a state-by-state breakdown showing the number of Indian tribes in the State, the number of survey responses, and the number of tribes that indicated they had private liability coverage.

SUMMARY OF SURVEY RESPONSES BY STATE

State	Tribes	Responses	Respondents with Insurance	State	Tribes	Responses	Respondents with Insurance
AL	1	1	1	MT	7	5	5
AK	232	40	20	NC	1	1	1
AZ	17	11	11	ND	5	1	1
CA	102	40	33	NE	3	3	3
CO	2	0	0	NM	22	11	11
CT	2	2	2	NV	22	5	5
FL	2	1	1	NY	7	2	2
IA	1	0	0	OK	19	18	17
ID	5	4	3	OR	9	7	7
KS	4	2	2	RI	1	0	0
LA	4	2	2	SC	1	0	0
MA	1	0	0	SD	8	1	1
ME	4	1	1	TX	3	2	2
MI	12	9	9	UT	4	1	1
MN	12	6	6	WA	28	26	26
MO	1	1	1	WI	11	4	4
MS	1	1	1	WY	2	1	1
Totals	403	121	93	Totals	153	88	87

While the overall response rate might indicate that the answers are not necessarily representative of Indian country as a whole, it is useful to further group the responses. Alaska and California have large numbers of very small tribes, many of which operate no Federally-funded programs and have no business enterprises. As an example, in Alaska the BIA funds 19 Self-Governance compacts through which services are provided to 161 Alaska Native villages and Indian tribes. If the responses are adjusted to separate tribes in the States of Alaska and California, more than half of all other tribes responded directly or through an insurance carrier to that portion of the survey asking whether a tribe has insurance, and 97 percent of these tribes answered in the affirmative.

ALASKA AND CALIFORNIA COMPARED TO ALL OTHERS

	Tribes*	Responses	Response Rate	Respondents with Insurance	% of Respondents with Insurance
AK	232	40	17%	20	50%
CA**	102	40	39%	33	83%
All Others	222	129	58%	125	97%
Totals	556	209	38%	180	86%

* Number of tribes at the time of the survey

** The survey was completed prior to approval of gaming compacts between the State of California and California Indian Tribes. Under the terms of the compacts, all tribes operating Class III gaming must have liability insurance

INSURANCE CLAIMS

Of the 144 tribes that responded directly to BIA, 29 did not have insurance. Three of the 29 tribes reported that they had gaming operations while the other 26 did not. Of the 115 that had insurance, 70 completed the portion of the survey requesting information on claims; nine of these respondents reported that no claims had been filed with them for the preceding three years. Of the nine tribes with no claims, two reported that they had gaming operations while seven had no gaming activities.

Of the remaining 61 tribes that reported claims had been filed during the previous three years, 21 tribes had no gaming and 40 tribes had gaming enterprises. As gaming tribes generally have more employees than non-gaming tribes and have larger numbers of non-members visiting tribal facilities, it is useful to display separately the reported claims history of the two groups. The Navajo Nation was one of the 21 non-gaming tribes that provided claims data. The Navajo Nation is self-insured and has an operational risk management program. The Nation has developed a body of tort law and tort claims against the Nation that are not covered by FTCA are heard in tribal court. While the number of claims reported by the Nation is reasonable given the size and scope of the Nation's operations, these claims have been excluded from the table below in order to provide a more accurate representation of the average number of claims and payments.

STATUS OF LIABILITY CLAIMS FILED (1996 - 1998)*

Liability Coverage	Claims Filed		Claims Paid		Amount Paid ($000)		Pending, Denied or Referred Claims	
	NG(20)	G (40)	NG (20)	G (40)	NG (20)	G (40)	NG (20)	G (40)
Automobile	32	2,258	32	1,335	46	1,872	0	923
General	15	5,188	7	1,632	127	2,713	8	3,556
Other	8	869	5	554	17	1,718	3	315
Police Professional	0	7	0	0	0	0	0	7
Workers' Comp.	94	9,600	88	8,352	103	13,100	6	1,248
Totals	129	17,882	112	11,833	273	19,363	17	6,049

* Status as of Summer 1999.

INSURANCE CLAIMS COMPARED TO TORT CLAIMS

In a recent report on Indian Tort Cla[illegible]RCED-00-169), GAO identified a total of 228 FTCA claims that had been filed for all tribally-o[illegible]ted BIA programs during the three year period of FY 1997 - FY 1999. If the Navajo claims are added to the data in the table above, more than 19,000 insurance claims were filed with just 61 tribes in the three-year period of FY 1996 - FY 1998. While it has been suggested that the relatively low number of FTCA claims results from a lack of familiarity on the part of tribes, to the extent that a tribe has had both insurance claims and FTCA claims, it is also reasonable to assume that the tribe recognizes the limitations of FTCA coverage and refers injured parties to insurers when the injury would not be compensable under FTCA.

WORKERS' COMPENSATION INSURANCE

Clearly, the bulk of insurance claims identified in the table on the preceding page are for injuries suffered by tribal employees. Claims of this type are not covered by FTCA. Tribes may recover the cost of workers' compensation insurance attributable to tribal personnel employed under Self-Determination awards within their indirect cost payments.

BIA ADMINISTRATIVE ACTIONS

The February 1998 report prepared for the Indian Health Service, ***Assessment of Access to Private Liability Insurance for Tribes and Tribal Organizations with Self-Determination Contracts/Compacts***, identified a number of operational [illegible]ues surrounding FTCA coverage and offered recommendations to address the problems. Although some of the recommendations are beyond the current technological capacity of the BIA and others would require nation-wide coordination of three separate Departments (DOI, HHS, and Justice), several of the recommendations can be implemented by BIA. These are identified below.

Problem: The authoritative information about FTCA coverage for tribal contractors is geared more toward lawyers than lay people.

- Develop informational materials written for the layperson that describe the immunity provided to self-determination contractors under FTCA and, to the extent possible, identify the types of activities that may not be protected to assist tribes in understanding the extent to which they may need supplemental private liability insurance. This guidance should be issued by the Federal government so that it may be shared with insurance companies as authoritative material.

Problem: The majority of tribes said that they did not know enough about what the FTCA would cover to be able to determine when private insurance products were duplicative.

- Develop examples of insurance contract language that would make the purchased insurance supplementary to the FTCA immunity.

Problem: Tribes have difficulty in identifying the proper individual within the Department of the Interior to contact or to work with to answer FTCA questions or resolve problems. They report frustration in being shuffled from person to person and from office to office.

- Provide all tribal contractors with the name, address, and telephone number of those individuals in the Department who can answer questions regarding FTCA coverage and claims.

The BIA plans to address each of these issues by December 31, 2000.

RECOMMENDATIONS

The Act requires that annual reports be submitted to Congress that contain legislative recommendations that the Secretary determines to be appropriate to improve the provision of insurance coverage to Indian tribes or to achieve the purpose of providing relief to persons who are injured as a result of an official action of a tribal government.

- **Actions to Improve the Provision of Insurance Coverage**

Most tribes opt to carry liability insurance because of the limited coverage that FTCA affords. The IHS study recommended the development of an on-line claims registry organized by type, location and disposition of the claim for internal agency use to facilitate consistency in interpreting the FTCA. In addition, the study recommended that a publicly available data base, containing the same information as the claims registry, but without identification of the tribes or individuals involved, would help both tribes and insurance brokers better determine the likelihood of FTCA coverage for certain activities and would make it easier for tribes to avoid purchasing unnecessary levels of insurance coverage.

Because information for such a registry would have to be supplied by three Departments: HHS, Interior, and Justice, and by multiple organizations within each of the Departments, the Administration will work internally and with Congress to: (1) identify the agency responsible for development and maintenance of the data base, (2) ensure that the affected agencies report the required data in a timely manner; and (3) manage interagency data base development.

- **Actions to Provide Relief to Persons who are Injured**

The General Accounting Office has identified four unique legal issues that have emerged from recent litigation of tribal FTCA claims:

1. FTCA does not provide statutory authority for the removal of FTCA cases filed in tribal courts.

2. Court decisions have differed on whether the "law of the place" should be tribal law for those incidents occurring on Indian land or state law as the phrase has historically been interpreted.

3. Legal arguments have been made that FTCA bars claims against tribal law enforcement officers for intentional torts, such as assault, battery, false imprisonment, and false arrest because tribal officers are not considered "investigative or law enforcement officers of the United States Government."

4 There are legal questions regarding FTCA coverage for tribal officials who exercise oversight over contracted programs but who do not participate in the day-to-day program operations.

3. Other Recommendations

The Act requires that the Secretary provide annual reports to Congress on liability coverage. The BIA recommends that this requirement be repealed.

1. The response rate to the initial survey was only 25 percent and that is certain to decline if the BIA sends out annual surveys;

2. Liability coverage generally does not change significantly from year to year; and

3. As a growing number of tribes expand the scope of their operations, Self-Determination awards represent a smaller percentage of tribal operations, thus there is a decreasing correlation between the availability of FTCA coverage for contracted programs and tribal decisions to purchase liability insurance.

CONCLUSION

From the data derived from the survey, it appears that well over 90 percent of Indian tribes that operate programs funded by the BIA carry liability insurance to provide relief to those who may suffer personal or property damage or loss as a result of tribal activities and that percentage can be expected to increase in the future as tribes continue to expand the scope of their operations and to increase the services that they provide to tribal members.

Coverage under the Federal Tort Claims Act has had little impact on tribal operations, as ten years after the extension of FTCA coverage to Self-Determination contractors, the majority of claims against Indian tribes are still covered by insurance policies purchased by the tribes rather than by FTCA. Viewed in the most positive light, this can be seen as a result of diversification of tribal programs and operations so that the BIA and IHS are not the sole means of support for tribal operations. It is likely, however, that the relatively complex FTCA processes and coverage limitations have prevented tribes from taking full advantage of the protections that are available under FTCA.